(5)

SHDKT PROCEEDINGS AND ORDERS DATE: [05/23/95]

CASE NBR: [94100802] CFH STATUS: [DECIDED]
SHORT TITLE: [Purkett, Supt., FCC]
VERSUS [Elem, Jimmy] DATE DOCKETED: [102694]

PAGE: [01]

~~~~~~~~DATE~~~~NOTE~~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~~~

1	Oct 26 1994	G	Petition for writ of certiorari filed.
2	Oct 26 1994		Appendix of petitioner filed.
3	Dec 7 1994		DISTRIBUTED. January 6, 1995 (Page 14)
4	Jan 4 1995	P	Response requested -- WHR. (Due February 6, 1995)
6	Jan 24 1995		Order extending time to file response to petition until March 8, 1995.
7	Mar 2 1995		Brief of respondent Jimmy Elem in opposition filed.
8	Mar 2 1995	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Mar 8 1995		REDISTRIBUTED. March 24, 1995 (Page 1)
11	Mar 27 1995		REDISTRIBUTED. March 31, 1995 (Page 12)
13	Apr 10 1995		REDISTRIBUTED. April 14, 1995 (Page 26)
15	Apr 17 1995		REDISTRIBUTED. April 21, 1995 (Page 16)
17	Apr 24 1995		REDISTRIBUTED. April 28, 1995 (Page 12)
19	May 8 1995		REDISTRIBUTED. May 12, 1995 (Page 23)

PREVIOUS 1 1 EXIT

Last page of docket

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PAGE: [02]

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20	May 15 1995		Motion of respondent for leave to proceed in forma pauperis GRANTED.
21	May 15 1995		Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Stevens with whom Justice Breyer joins. Opinion per curiam.

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No. 94- _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

James Purkett, Superintendent
Farmington Correctional Center ..... *Petitioner*
vs.
Jimmy Elem ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL OF MISSOURI

STEPHEN D. HAWKE
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

P. O. BOX 899
JEFFERSON CITY, MO 65102
(314) 751-3321

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

WHETHER A VENIREPERSON'S INDIVIDUAL CHARACTERISTIC OF APPEARANCE CONSTITUTES A LEGALLY SUFFICIENT NON-RACIAL REASON AND A NON-PRETEXTUAL REASON FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE UNDER *HERNANDEZ V. NEW YORK*, 111 S.CT. 1859 (1991).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules of Court

No. 94 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

James Purkett, Superintendent
Farmington Correctional Center ..... Petitioner

vs.

Jimmy Elem ..... Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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OPINIONS BELOW

The June 1, 1994 panel opinion of the United

States Court of Appeals remanding the cause to the district court with instructions to grant the writ of habeas corpus is reported at 25 F.3d 679 (8th Cir. 1994), and is included in the Appendix at A-1.

The order denying the petition for rehearing or rehearing en banc is unreported but is included in the Appendix at A-45.

The orders of the United States Court of Appeals for the Eastern District of Missouri denying the petition for writ of habeas corpus are not reported but is included in the Appendix at A-14 and A-15.

The Magistrate's Report and Recommendation is not published, but is also included in the Appendix at A-17.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on June 1, 1994. The petition for rehearing or rehearing en banc was denied on July 28, 1994. Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.1 and 13.4, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the Circuit Court of the City of St. Louis, respondent was convicted by a jury of second degree robbery, § 569.030.1, RSMo 1986, and was sentenced by the court as a persistent offender, § 558.016.3, RSMo 1986, to twenty-five years in prison. The facts surrounding the circumstances of the offense are as follows: The victim, a black woman, was walking home from work on October 5, 1985, at about 11:00 p.m. A black man, wearing grey sweatpants, a grey hooded sweatshirt and white high-topped tennis shoes, jogged past her, ran ahead, and then turned and jogged toward her. She saw his face as he approached because the area was well lighted. As he passed, he grabbed her, pulled her into an adjacent building, and hit her. He demanded money and threatened her with a bottle he broke against a wall. She pulled away from him and ran back to the street, where he caught her purse, breaking its handle and snatching it from her. She again saw his face. He fled into a dead-end street and then south across a small park. The victim, along with two black women in a car who had seen the man steal the purse, followed him as far as the dead-end. The victim noted that the man had "French braided" hair.

Officer John Bridges of the Wellston Police Department spoke to two black women in a car at the police station and again near a liquor store, which was a few blocks south of the scene of the incident. At the liquor store, Bridges detained respondent, who was at the liquor store, asking for a clothes hanger to open his car; he said he had locked his keys in his car. Respondent was wearing cut-off blue jeans, a tee-shirt and white high-topped tennis shoes despite the fact that the weather was "chilly," and he was the only person at the liquor store in shorts. Bridges noticed that respondent was perspiring and his hair had French braids. He took respondent to the vacant building, the scene of the assault, where the victim, sitting in another officer's car, identified him as her assailant. Another officer found grey sweatpants, inside out and with burrs stuck to them, a grey hooded sweatshirt and the victim's purse under a car parked near the liquor store. The victim identified the sweatpants and sweatshirt as those worn by the robber. The Missouri Court of Appeals affirmed respondent's conviction and sentence. *State v. Elem*, 747 S.W.2d 772, 773 (Mo.App., E.D. 1988) (App. A-29). After his direct appeal was affirmed, respondent pursued relief in the federal courts.

Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 23, 1992, in the United States District Court for the Eastern District of Missouri (App. A-46). After respondent filed his responsive pleading to the District Court's show cause order, the District Court referred the matter to a United States Magistrate for a Report and Recommendation. The Magistrate, Terry I. Adelman, recommended on January 19, 1993, that the petition be denied (App. A-17). After objections by respondent, on February 18, 1993, the District Court, the Honorable Jean C. Hamilton, entered an order sustaining and adopting the Magistrate's Report and Recommendation (App. A-15). At that time, the District Court also denied the petition for writ of habeas corpus (App. A-14).

Respondent appealed the denial of relief to the United States Court of Appeals for the Eighth Circuit. After briefing and an oral argument, the Court entered an order remanding the cause to the District Court with directions that the writ of habeas corpus issue. Petitioner filed a petition for rehearing and rehearing en banc. On July 28, 1994, the panel denied the petition for rehearing (App. A-45). The suggestions for rehearing en banc were also denied; however, three judges of the appellate

court, the Honorable Pasco M. Bowman, II, the Honorable C. Arlen Beam and the Honorable Morris S. Arnold, voted to grant the petition for rehearing en banc (App. A-45). The present petition for writ of certiorari ensues.

ARGUMENT

WHETHER A PERSON'S INDIVIDUAL CHARACTERISTIC OF APPEARANCE CONSTITUTES A LEGALLY SUFFICIENT NON-RACIAL REASON AND A NON-PRETEXTUAL REASON FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE UNDER *HERNANDEZ V. NEW YORK*, 111 S.CT. 1859 (1991).

The Court is aware of the importance of peremptory challenges to the litigants in criminal and civil litigation. Beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court initiated closer regulation of the peremptory challenge process. While the *Batson* decision created a framework for examining a prosecutor's use of peremptory challenges, this Court has extended this review to the examination of peremptory challenges by a criminal defendant, *Georgia v. McCollom*, 112 S.Ct. 2348 (1992) and to the entire civil bar, *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991). The importance of proper review by trial courts and appellate courts of the *Batson* framework is apparent. The Court of Appeals method of review conflicts with courts from other circuits and creates a

significant question for review by this Court. Supreme Court Rule 10.1.

Batson v. Kentucky sets forth a three step test for trial courts in evaluating claims that a litigant has used a peremptory challenge in a manner violating the equal protection clause. 476 U.S. at 96-98.

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. at 1722-1723. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. *Id.* at 97-98, 106 S.Ct. at 1723-24. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98, 106 S.Ct. at 1723.

Hernandez v. New York, 111 S.Ct. 1859, 1866 (1991) *citing Batson v. Kentucky*, 476 U.S. at 96-98. Once these

matters are resolved by the trial court, the appellate court then has the power to review for clear error. In the context of federal habeas corpus litigation, this review requires the application of a statute. 28 U.S.C. § 2254(d). The reviewing federal courts, be they district courts, courts of appeals, or this Court, are required by this statute to accord state court factual findings a presumption of correctness. *Hernandez v. New York*, 111 S.Ct. at 1869. The Court of Appeals blurs the second and third steps of a *Batson* challenge. This petition will separate steps two and three and will discuss why the state courts' and the magistrate's and the district court's findings of no racial discrimination should be affirmed.

Step One

The panel applied *Hernandez v. New York* concerning the issue of whether petitioner made a prima facie case (App. A-7 to A-8 *citing Hernandez v. New York*, 111 S.Ct. at 1866).

Step Two

Once a prima facie case is made, the striking

litigant must articulate a race-neutral explanation for striking the juror. *Hernandez v. New York*, 111 S.Ct. at 1866 *citing Batson v. Kentucky*, 476 U.S. at 97-98. This is called a burden of production. The *Hernandez* court defined this element:

> In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.

Id. at 1866. The *Hernandez* court continued:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.

Id. at 1866. In discussing *Batson's* second step, the court of appeals fails to rely on the controlling precedent of *Hernandez*[1]. (App. A-8 to A-11).

The reasons articulated by the prosecutor for his strike of Juror 22 concerned that juror's appearance.

> I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder-length, curly, unkept hair. Also, he had a

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[1]As *Hernandez* makes clear, the question of whether the attorney's explanation was race-neutral is a legal issue. Of course, currently, issues of federal constitutional law are subject to *de novo* review by the federal court, not the clearly erroneous standard applied by the Court of Appeals (App. A-12). *United States v. Wilson*, 884 F.2d 1121, 1124 (8th Cir. 1989) (en banc). This error by the Court of Appeals is to the detriment of a challenging party in its attempt to obtain appellate review.

> length, curly, unkept hair. Also, he had a mustache and a goatee-type beard. And Juror number twenty-four also has a mustache and a goatee-type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four[,] with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they look, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.

(App. A-41).

Applying the *Hernandez* standard to the reason stated by the prosecutor, the issue becomes whether, "assuming the proffered reasons for the peremptory challenges are true, the challenges violate the equal protection clause as a matter of law." *Hernandez v. New York*, 111 S.Ct. at 1866. Using a peremptory challenge on an individual on the basis of his shoulder length, curly, unkempt hair and his facial hair does not violate the Equal Protection Clause as a matter of law. This

than the race of the juror." *Id.* Since no discriminatory intent is inherent in the prosecutor's explanation. The proffered reason should be deemed race-neutral. *Id.* Further applying the *Hernandez* analysis, "the prosecutor's articulated basis for these challenges divide potential jurors into two classes": those with unkempt hair and facial hair and those without. Each category would include both African-Americans and non-African-Americans. "The wearing of beards is not a characteristic that is peculiar to any race." *E.E.O.C. v. Greyhound Lines*, 635 F.2d 188, 190 n. 3 (3d Cir. 1980). The prosecutor's explanation does not lead to the conclusion that the challenge violates the Equal Protection Clause as a matter of law. *See id.* at 1867.

The Court of Appeals failed to perform *Hernandez* analysis as to the second step of the Batson test (App. A-8 to A-11). Instead of applying the specific and clear language of *Hernandez*, the panel stated:

> In a case such as this, where the prosecution strikes a prospective juror who is a member of the defendant's racial

> group, [2] solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in a particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror.

(App. A-11) (footnote added). The Court should notice that this is not a quote from an opinion from the United States Supreme Court. This Court should notice that the Court of Appeals offers no citation to support this legal principle. Finally, this Court should notice that this language is inconsistent with the standard in *Hernandez*. Again, the *Hernandez* court stated:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.

Hernandez v. New York, 111 S.Ct. at 1866. This Court does not require a striking litigant to "articulate some plausible race-neutral reason for believing those factors will somehow affect the person's abilities to perform his or her duties as a juror," as required by the opinion below. (App. A-11).

Since a striking litigant is using "intuition" or "hunch" as the basis for the strike, it will be virtually impossible for that litigant to say why he or she wants to remove that venireperson[3]. This new legal requirement

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[2] This Court says that the litigant challenging a party's peremptory challenge need not be a member of the same group as the venireperson. *Powers v. Ohio*, 111 S.Ct. 1364 (1991). Petitioner has no explanation for the Court of Appeals' addition of this element.

[3] In *State v. Aubrey*, 609 So. 2d 1183 (La.Ct.App., 3d Cir. 1992), venireperson Janice Morris came to court with her hair in curlers. The curlers would not affect her performance as a juror, but the Court can see

violates the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989). This new legal requirement is contrary to the express language from this Court. Given the conflict between the opinion of the lower court and this Court, certiorari review is necessary. Supreme Court Rule 10.1.

A case from the Fifth Circuit also illustrates that a litigant's "intuition" should be a sufficient race-neutral reason under the second step of *Batson*. Whether it will be believed by the trial judge (Step Three) is a separate issue of course.

> An attorney who claims that he or she struck a potential juror because of intuition alone, without articulating a specific factual basis such as occupation, family background or even eye contact or inattentiveness, is more vulnerable to the inference that the reason proffered is a proxy for race. That is not to say, however, that the reason should be rejected out of hand; that is a call for the judge to make . . . .

United States v. Bentley-Smith, 2 F.3d 1368, 1375 (5th Cir. 1993). A litigant's reason need not be like a challenge for cause, *Batson v. Kentucky*, 476 U.S. at 97; thus, a litigant's use of intuition is proper. *United States v. Munoz*, 15 F.3d 395, 399 (5th Cir. 1994) (strike because juror was unemployed and had children on welfare); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) (juror sat with arms crossed and appeared hostile); *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir.) (juror "slovenly" attired), *cert. denied*, 490 U.S. 1028 (1989); *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991) (hairstyle and dress); *United States v. Hughes*, 911 F.2d 113 (8th Cir. 1990) (shabby dress); *United States v. Hendrieth*, 922 F.2d 748 (11th Cir. 1991) (juror rubbing and rolling eyes).

In the paragraph following the Court of Appeals announcement of the new legal standard (App. A-11 to A-12), the Court of Appeals quotes *Hernandez* to support its standard. The *Hernandez* language is out of context. Significantly, the court does not quote language from

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how one of the litigants, be it the defendant, the State or a civil litigant, would want to use a peremptory challenge on this individual.

Section IIB of the *Hernandez* opinion, the section of that opinion concerning *Batson's* second step. *Hernandez v. New York*, 111 S.Ct. at 1866-68. Rather, the Court of Appeals quotes language from page 1873 of the *Hernandez* opinion, where this Court warned that a trial judge may not believe a prosecutor's reason for a strike if it does not relate to the particular circumstances of the trial or the individual responses of the jurors (App. A-12, *quoting Hernandez v. New York.*, 111 S.Ct. at 1873). First, this quoted language concerns *Batson's* third step, whether the prosecutor's stated reason is a "pretext for racial discrimination" (App.A-12). This quoted language does not support the proposition that, as a matter of law, the prosecutor must explain how his racially neutral reason for striking a venireperson might somehow affect the ability of that venireperson to perform his or her duties.

To the contrary, the quoted language from *Hernandez* fatally undercuts the new legal standard from the Court of Appeals. Before the third *Batson* issue (pretext) can be reached, the striking litigant must fulfill his burden of production, articulating a race-neutral explanation for the strike. *Batson v. Kentucky*, 476 U.S. at 97-98. If the striking litigant does not fulfill this

burden, the *Batson* inquiry is complete and resolved against the striking litigant. *See United States v. Wilson*, 884 F.2d at 1124. According to *Hernandez*, since the *Batson's* third step can be reached in a situation where a striking litigant gives a race-neutral reason for the strike "without regard to the particular circumstances of the trial or the individual response of the jurors," the race-neutral explanation is sufficient as a matter of law without further explanation. Put another way, the quoted language notes that the trial judge may accept a race-neutral explanation even if it does not relate to the case or to the jurors. For the trial judge to have that discretion, a race-neutral reason for the strike must be sufficient as a matter of law under step two of *Batson* and *Hernandez*. Not only does *Hernandez* lend no support to the Court of Appeals novel proposition, indeed, the Court of Appeals' legal conclusion is contradicted by *Hernandez's* legal analysis.

The Court of Appeals also purports to rely upon language from the Supreme Court of Missouri's decision in *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988) (App. A-9 to A-11). First, *Antwine* was decided by the Supreme Court of Missouri four years before this Court's decision in

Hernandez. Between the two, *Hernandez* should control. Second, the Supreme Court of Missouri has candidly stated that *Antwine* does not follow the procedures set forth in *Batson*; rather, the *Antwine* procedure is more solicitous of equal protection rights than required by this Court. *See State v. Parker,* 836 S.W.2d 930, 938 (Mo. banc), *cert. denied*, 113 S.Ct. 636 (1992). Third, since *Antwine*, the Supreme Court of Missouri has stated that "the degree of logical relevance between the proffered explanation and the case to be tried in terms of the kind of crime charged, the nature of the evidence to be adduced, and the potential punishment if the defendant is convicted is likewise important" in determining whether the explanation is pretextual. *Id*. at 940. The Supreme Court of Missouri has made clear that the factor the Court of Appeals found determinative of the *Batson* second step is, in reality, merely one of several factors to be considered in resolving the *Batson* third step.

Finally, the Court of Appeals relies on language in *Batson* to support its new standard. The language in *Batson*, however, should be contrasted with that in *Hernandez*. While *Batson* was a very general case, the *Hernandez* decision went to great lengths to describe the parameters of a litigant's race-neutral explanation for a

strike. *Hernandez v. New York*, 111 S.Ct. at 1866-68. The *Hernandez* decision is also more recent than *Batson*. The purpose of the "clear and reasonably specific" language in *Batson* was to emphasize the requirement that a litigant's statement of good faith or disclaimer of discriminating intent was insufficient. *Batson v. Kentucky*, 476 U.S. at 97-98; *United States v. Wilson,* 867 F.2d 486, 488 (8th Cir. 1989); *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992). This purpose is now fulfilled by the *Hernandez* test. Petitioner submits that *Hernandez* properly describes *Batson's* second step. See *United States v. Bentley-Smith*, 2 F.3d at 1375 (upholding intuitive reasons for strike as "clear and reasonably specific").

Step Three

Once the striking litigant states a race-neutral reason for the peremptory strike, the trial court then has the duty to determine if the objecting litigant has established purposeful discrimination. *See Hernandez v. New York*, 111 S.Ct. at 1868. This is an issue for the trial court to decide. The Court of Appeals' standard of review of federal district court decisions on this issue is one for "clear error." "On federal habeas review of a state conviction, 28 U.S.C. § 2254(d) requires the federal

courts to afford state court factual findings a presumption of correctness." *Hernandez v. New York*, 111 S.Ct. at 1869. The issue before the federal habeas corpus appellate court is not whether there is "clear error" since that is not one of the statutorily enumerated exceptions to the presumption of correctness. 28 U.S.C. § 2254(d) (1) - (8). Rather, as the Supreme Court and Congress require, the issue is whether the state court's factual determination is "fairly supported by the record." 28 U.S.C. § 2254(d) (8). *See Marshall v. Lonberger*, 489 U.S. 422, 434-35 (1983) (distinguishing state and federal appellate court review of fact finding). Is there fair support in the record for the state court's finding that there was no intentional discrimination? Yes. The fair support takes several forms.

First, perhaps most obviously, is the prosecutor's stated reason for his peremptory strike (shoulder length, curly, unkempt hair with mustache and beard) -- a reason the trial court found credible (App. A-42 to A-43). If the trial court found this race-neutral reason credible, such a determination is a finding of fact to which the federal courts owe deference. "Title 28 U.S.C. § 2254(d) gives federal courts no license to redetermine credibility of witnesses whose demeanor has been observed by the

federal trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. at 434. The Court of Appeals, however, protests that there was insufficient detail in the prosecutor's reason (App. A-11). Congress, however, gives no license to redetermine the credibility of the litigant's attorney. *See United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir. 1993) (upholding litigant's strike of juror due to long hair and beard).

Second, after the prosecutor gave his race-neutral explanation for his peremptory challenge, petitioner did not suggest to the trial court that the reason was a pretext. Petitioner's attorney stated:

> Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record[,] if the court would like to call up these two individuals to ask them if they are black or will the court take judicial notice that they are black individuals?

THE COURT: I am not going to do that, no, sir.

MR. GOULET: Okay. Nothing further.

(App. A-42). As the record demonstrates, after the prosecutor gave his race neutral reasons for striking venireperson number twenty-two, petitioner offered no reason to the trial court to believe that it was pretextual. "Once the State came forward with neutral explanations, defendant had the obligation to demonstrate that the State's explanations were pretextual." *State v. Hudson,* 822 S.W.2d 447, 481 (Mo.App., E.D. 1991). While petitioner was before the trial court, however, he did not even allege that the prosecutor's explanations were pretextual. Under these circumstances, "we must assume that no challenge was made to the State's reasons because trial counsel was satisfied that the strike had not been made with the intent to discriminate." *State v. Davis*, 835 S.W.2d 515, 527 (Mo.App., E.D. 1992). "Where counsel for appellant is satisfied with the reasons given, this [appellate] court is hardly in a position to find that the trial court erred." *Id.; State v. Jackson*, 809 S.W.2d 77, 81 (Mo.App., E.D. 1991); *United States v.*

Brooks, 2 F.3d 838, 841 (8th Cir. 1993). Respondent's failure to suggest that the prosecutor's explanation was pretextual is also fair support for the state court's factual finding.

Third, the prosecutor used less than all his peremptory strikes to remove only two of the three African-American venirepersons (App. A-39). The Court of Appeals analysis of this factor is inapplicable. The reference to *Randolph v. Delo*, 952 F.2d 243, 245 & 3 (8th Cir. 1991) (per curiam) *citing United States v. Johnson*, 873 F.2d 1137, 1139 n. 1 (8th Cir. 1989), refers only to the issue of whether a prima facie case has or has not been established through statistics (*Batson* step one). Of course, if a litigant has the opportunity to strike African-Americans but does not, this fact creates a permissive inference that the litigant's strikes were made lawfully. *See United States v. Jiminez*, 983 F.2d 1020, 1023 (11th Cir. 1993); *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir.), *cert. denied*, 111 S.Ct. 1681 (1991) (unchallenged African-American on jury undercuts inference of discrimination); *United States v. Nichols*, 937 F.2d 1257, 1264 (7th Cir.), *cert. denied*, 112 S.Ct. 989 (1991).

Fourth, the prosecutor voluntarily defended his use of peremptory challenges without a request by the trial judge (App. A-39). This is an independent factor this Court found as support for the findings in *Hernandez v. New York*, 111 S.Ct. at 1872.

Fifth, the prosecutor was unaware of which venirepersons were African-Americans. "I don't know if all three of those people are, in fact, black. There has been no testimony to that . . ." (App. A-40). Again, this is an independent factor that this Court found to support the trial court's factual finding that there was no intentional discrimination. *Hernandez v. New York*, 111 S.Ct. at 1872.

Sixth, the Missouri Court of Appeals found the fact that the crime victim was an African-American supported the trial court's finding that there was no intentional discrimination. *State v. Elem*, 747 S.W.2d at 775. This Court also found that the ethnicity of the victim and the prosecution witnesses tended to undercut the motive to exclude Latinos from the jury. *Hernandez v. New York*, 111 S.Ct. at 1872. Likewise, the race of the victim and the prosecution's chief witness in the present case also supports the trial court's finding. The

Court of Appeals failed to discuss the factors that this Court felt were significant in *Hernandez*. "Any of these factors could be taken as evidence of the prosecutor's sincerity." *Hernandez v. New York*, 111 S.Ct. at 1872.

The state court's fact finding has fair support in the record. 28 U.S.C. § 2254(d).

The significance of this issue to the trial practitioners is apparent. As this Court has made clear, racial, ethnic and gender discrimination by prosecutors, by defense counsel, and by civil practitioners is unlawful. That is as it should be. When a practitioner, however, offers a race-neutral explanation for the peremptory strike, that fulfills the *Batson* burden of production. There should be no requirement upon the civil and criminal Bars to explain their trial strategy -- intuition, hunches and the like -- beyond the basic requirement of *Hernandez*. Any decision by the litigant to do so should be made only out of a desire to make the race-neutral explanation more credible to the trial judge. *Hernandez v. New York*, 111 S.Ct. at 1873. Once a race-neutral explanation is made, then the trial courts are obligated to determine whether the explanation is pretextual. As *Hernandez v. New York* attempted to make clear, the trial court's determination of pretext, whichever way it is

trial court's determination of pretext, whichever way it is decided, is subject to deference by an appellate court reviewing a cold record years after trial. *Id.* at 1868-72. There should be an additional degree of deference when a federal appellate court is reviewing the fact-finding of a state trial court. 28 U.S.C. § 2254(d). The issue presented in the present litigation is of interest to all practitioners, practitioners in state and federal court as well as practitioners in civil and criminal litigation.

Conclusion

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

Jeremiah W. (Jay) Nixon
Attorney General

Stephen D. Hawke
Assistant Attorney General
Counsel of Record

Post Office Box 899
Jefferson City, MO 65102-0899
(314) 751-3321

Attorneys for Petitioner

(2)

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No. ~~OFFICE OF THE CLERK~~

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

James E. Purkett, Superintendent
Farmington Correctional Center ..... *Petitioner*
v.
Jimmy Elem ..... *Respondent.*

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

Jeremiah W. (Jay) Nixon
Attorney General of Missouri

Stephen D. Hawke
Assistant Attorney General
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioner

18 pp

INDEX OF APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1793

Jimmy Elem,

Appellant,

v.

James Purkett,

Appellee.

* Appeal from the United States District Court for Eastern District of Missouri

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Submitted: November 10, 1993
Filed: June 1, 1994

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

McMILLIAN, Circuit Judge.

In this habeas action brought pursuant to 28 U.S.C. § 2254, petitioner Jimmy Elem appeals from a final order entered in the United States District Court for the Eastern District of Missouri denying his petition for a writ of habeas

corpus. For reversal, petitioner argues that the district court erred in holding: (1) he failed to prove either cause and prejudice or a fundamental miscarriage of justice to overcome his procedural default of all but two of his claims; (2) he failed on the merits of his equal protection claim under Batson v. Kentucky, 476 U.S. 79 (1986) (Batson); and (3) he failed on the merits of his due process claim. For the reasons discussed below, we affirm in part and reverse in part and remand the matter to the district court with directions.

In July of 1986, petitioner was convicted of second degree robbery following a jury trial in Missouri state court. The underlying offense involved an assault and robbery of an African-American woman who identified her assailant as an African-American man with "french-braided" hair and wearing a gray sweatsuit. Petitioner, who fit the description of the robber, was apprehended near the scene of the robbery. The victim identified him as her assailant. During jury selection, petitioner objected to the prosecutor's use of peremptory challenges to strike two African-American men from the jury panel. The prosecutor indicated that his reasons for the strikes were, in part, based upon the jurors' appearance. The state trial court overruled the objection. At trial, a gray sweatsuit was admitted into evidence. The victim identified the sweatsuit as the one worn by the robber.[1]

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[1]At the time petitioner was apprehended by the police, he was wearing cut-off blue jeans and a T-shirt, and the

During deliberations, the jury inadvertently discovered what appeared to be a marijuana cigarette, or "joint," in the sweatsuit. Petitioner moved for a mistrial on grounds that the "joint" was evidence of a crime for which petitioner had not been charged. The trial court denied the motion. After the jury returned a verdict of guilty, petitioner moved for a new trial on the same grounds. The state trial court heard testimony of the jury foreperson, who stated that the jury placed no emphasis on the "joint" in its deliberations. The trial court denied petitioner's motion for a new trial.

Petitioner was sentenced as a persistent offender and received a twenty-five year sentence. He appealed his conviction asserting two grounds: (1) the prosecutor's use of peremptory challenges to strike two African-American jurors violated Batson; and (2) the jury's inadvertent discovery of the apparent "joint" in the gray sweatsuit violated his due process rights. The Missouri Court of Appeals affirmed his conviction. State v. Elem, 747 S.W.2d 772 (Mo. Ct. App. 1988). Petitioner did not bring a state court action seeking post-conviction relief. He next filed a petition for writ of habeas corpus pro se in federal district court. The matter was referred to a United States magistrate judge, who recommended that the petition be denied without a hearing. Elem v. Purkett, No. 4:92CV1927 (E.D. Mo. Jan. 19, 1993) (report and recommendation). The district court adopted the

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sweatsuit was found underneath a nearby parked car.

magistrate judge's report and recommendation and denied the petition. Id. (Feb. 18, 1993) (order). This appeal followed.

Procedural default

Petitioner first argues on appeal that the district court erred in holding that he is not entitled to habeas review of claims which he failed to raise on direct appeal. Of the ten claims asserted by petitioner, the district court declined to consider eight on grounds of procedural default not excused by cause and prejudice or amounting to a fundamental miscarriage of justice.[2] Petitioner now contends that his

[2]Petitioner claims: (1) he received no Miranda warnings; (2) there was insufficient evidence to convict him and that the trial court erred in admitting certain items of physical evidence; (3) he was convicted through use of "incredibly bad police work"; (4) the state trial court abused its discretion by considering "hearsay testimony" of the jury foreperson concerning the basis for the conviction; (5) the prosecutor introduced evidence concerning two "unknown and/or alleged" witnesses, thereby depriving petitioner of the right to confront his accusers; (6) the prosecutor engaged in improper and prejudicial argument; (7) defense counsel was incompetent; and (8) the original information charging him with robbery in the second degree was fatally defective for failing to indicate he stole over $150.00. Slip op. at 2-3.

procedural default should be excused on grounds that a fundamental miscarriage of justice will result if his claims are not considered on their merits. Sawyer v. Whitley, 112 S. Ct. 2514 (1992) (applying fundamental miscarriage of justice standard to penalty phase of capital murder case). In Sawyer v. Whitley, the Supreme Court considered whether the petitioner was eligible for habeas review of his death sentence under the fundamental miscarriage of justice doctrine, despite the procedural default of his constitutional claims. The Court explained, in that context, that "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Id. at 2517. Having reviewed the petition in the present case, the district court held that petitioner "has not shown any facts to warrant concern about a fundamental miscarriage of justice." Slip op. at 4. Upon careful review, we agree. None of petitioner's procedurally defaulted claims, even if proven, would establish by clear and convincing evidence that petitioner is "actually innocent" of the offense such that no reasonable juror would have found him guilty. Accordingly, we affirm this aspect of the district court's order.[3]

[3]We recognize that some of petitioner's defaulted claims are moot in light of our reversal on Batson grounds. However, because some may be reasserted if petitioner is retried, we address the procedural default issue.

Batson violation

Petitioner next argues that the district court erred in holding that his equal protection rights under Batson were not violated as a result of the prosecutor's use of peremptory challenges to strike two African-American jurors from the jury panel. Petitioner challenges the legitimacy of the prosecutor's explanation for striking jurors 22 and 24.[4] The prosecutor stated that he struck juror 22 because that juror had long curly hair, a mustache and a goatee-type beard. He also noted that juror 24 had a mustache and a goatee-type beard. Apparently they were the only two with facial hair on the panel. The prosecutor stated "I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." He then further noted that juror 24 had been a witness in a supermarket robbery and had a sawed-off shotgun pointed at his face. The prosecutor stated "I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." Trial Transcript at 61.

In Batson, the Supreme Court held that purposeful racial discrimination in the jury selection process violates a criminal defendant's constitutional rights. "The Equal

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[4]The prosecutor did not exercise a peremptory challenge to strike juror 16, an African-American woman.

Protection Clause guarantees the defendant that the State will not exclude members of his [or her] race from the jury venire on account of race, . . . or on the false assumption that members of his [or her] race as a group are not qualified to serve as jurors." 476 U.S. at 86 (citations omitted). Batson requires the criminal defendant to establish a prima facie case of racial discrimination in the jury selection process by showing: (1) he or she is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire panel; and (3) these facts and any other relevant circumstances raise an inference that the prosecutor purposefully excluded the venire persons from the petit jury because of their race. Id. at 96. Once the defendant makes a prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation for the peremptory strikes. On that point, the Court further explained that blacks may not be excluded on the assumption that they, as a group, are not qualified to serve as jurors, or that they will be biased simply because the defendant is black. Id. at 97. Notably, "the prosecutor must give a 'clear and reasonably specific' explanation of his [or her] 'legitimate reasons' for exercising the challenges." Id. at 98 n.20 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)) (emphasis added). Finally, the trial court must ultimately decide whether the defendant has established purposeful discrimination. Batson, 476 U.S. at 98. As a practical matter, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court

has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991) (Hernandez). At that point, the only question is whether the prosecution exercised its peremptory challenge with a racial animus. The trial court's ultimate finding on this issue is to be set aside only if clearly erroneous. Id. at 1871.

Our review in the present case focuses on whether the state trial court clearly erred in its ultimate determination that the prosecution's actions were not racially motivated with respect to jurors 22 and 24. We are mindful of the presumption of correctness that is due the state courts' factual findings on habeas review. As to juror 24, we find no clear error. As to juror 22, however, we hold that a Batson violation did occur and reverse the district court's holding to the contrary.

The Missouri Court of Appeals and the district court both reached the conclusion that no Batson error occurred in this case by relying on the Missouri Supreme Court's decision in State v. Antwine, 743 S.W.2d 51 (Mo. 1987) (en banc) (Antwine), cert. denied, 486 U.S. 1017 (1988), which interpreted Batson.[5] Antwine has been cited with approval by

[5]Antwine was decided after the petitioner's state court trial, but before this case was heard on appeal before the

this Court. See Jones v. Jones, 938 F.2d 838, 844 (8th Cir. 1991). In Antwine, the Missouri Supreme Court commented on the legitimacy of a prosecutor's reliance on subjective grounds for exercising a peremptory challenge in the context of a Batson challenge. The Antwine court explained "we believe that Batson leaves room for the State to exercise its peremptory challenges on the basis of the prosecutor's legitimate 'hunches' and past experience, so long as racial discrimination is not the motive." 743 S.W.2d at 65. The court went on to explain:

> [w]e do not believe, however, that Batson is satisfied by "neutral explanations" which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, Batson would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote "neutral explanations" which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced Batson.

Id.

Missouri Court of Appeals.

On review of petitioner's Batson claim, the Missouri Court of Appeals noted that the prosecutor used less than all of his peremptory strikes to remove only two of the three African-American venire persons.[6] The state appellate court also noted that the victim was African-American, and that the state gave some explanation for the strikes. Citing Antwine, the Missouri Court of Appeals then concluded "[w]e believe the state's explanation constituted a legitimate 'hunch.'" State v. Elem, 747 S.W.2d at 775. On habeas review, the district court noted the Missouri Court of Appeals' finding of a legitimate "hunch." Giving the state courts' factual findings a presumption of correctness, the district court then concluded "[t]he record supports the Missouri Court of Appeals' finding of no purposeful discrimination." Slip op. at 8.

We believe that the Missouri Court of Appeals, and the district court on habeas review, took the Missouri Supreme Court's reference to "a prosecutor's legitimate 'hunches'" in Antwine out of context and, as a result, misapplied the standard intended in Batson. In Antwine, the

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[6]The Missouri Court of Appeals found it significant that the prosecutor struck only two out of three African-American venire persons. State v. Elem, 747 S.W.2d at 775. We have held that such numerical calculations are not sufficient to disprove the existence of a Batson violation. See Randolph v. Delo, 952 F.2d 243, 245 & n.3 (8th Cir. 1991) (per curiam).

Missouri Supreme Court recognized that a prosecutor's racially-neutral subjective intuitions may, in some circumstances, qualify as legitimate grounds for striking a prospective juror; yet the court was careful to caution "[w]e do not believe, however, that Batson is satisfied by 'neutral explanations' which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, Batson would be meaningless." Antwine, 743 S.W.2d at 65 (emphasis added).

In a case such as this, where the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, "I don't like the way [he] look[s], with the way the hair is cut . . . . And the mustache[] and the beard[] look suspicious to me," do not constitute such legitimate race-neutral reasons for striking juror 22.

In Hernandez, the Supreme Court declined to set aside the state courts' rejection of a Batson claim where the prosecutor struck two Spanish-speaking Latino jurors on grounds that, based upon their answers and demeanor in voir dire, he had doubts about their ability to defer to official translations during trial. The Supreme Court accepted this as

a plausible race-neutral basis for the strikes. 111 S. Ct. at 1867-68. However, the Supreme Court also observed "a policy of striking all who speak a given language without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination." 111 S. Ct. at 1873 (emphasis added). Similarly, in Batson, the Supreme Court explained "[t]he prosecutor . . . must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98 (emphasis added).

Guided by the Supreme Court's decisions in Batson and Hernandez, and our interpretation of Antwine, we conclude that the prosecution's explanation for striking juror 22 in the present case was pretextual. The prosecutor's explanation was "facially neutral . . . without more," which is precisely what Antwine cautions against. 743 S.W.2d at 65. As stated in Hernandez, "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." 111 S. Ct. at 1870. We thus hold, based upon the record as a whole, that the state trial court clearly erred in finding that the prosecutor's elimination of juror 22 was not intentionally discriminatory. Accordingly, we reverse the district court's ruling to the contrary and remand this case to the district court with instructions to grant the writ of habeas corpus on the basis of the violation of petitioner's equal protection rights under Batson. No evidentiary hearing in the district court will be necessary.

Having concluded that petitioner is entitled to habeas relief on his Batson claim, we need not reach petitioner's separate due process claim related to the apparent "joint" found by the jury in the gray sweatsuit. Presumably that inadvertent discovery will not recur if petitioner is retried, and the issue will become moot.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JIMMY ELEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:92CV1927JCH
	)	
JAMES PURKETT,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL

IT IS HEREBY ORDERED that Jimmy Elem's Petition for Writ of Habeas Corpus is **DENIED.**

Dated this 18th day of February, 1993

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JIMMY ELEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:92CV1927 JCH
	)	
JAMES PURKETT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court pursuant to the Report and Recommendation filed by United States Magistrate Judge Terry I. Adelman on January 19, 1993. This case was referred to Magistrate Judge Adelman pursuant to 28 U.S.C. §636(b) for his review and recommendation as to Petitioner's Petition for Writ of Habeas Corpus. It is Magistrate Judge Adelman's recommendation that Petitioner's Application be dismissed without further proceedings.

On January 28, 1993, Petitioner filed objections to the Magistrate Judge's recommendation. In his objections, Petitioner does not address the issues raised in the Magistrate

Judge's Report; Petitioner merely reiterates the grounds set forth in his Petition.

After careful consideration of this matter,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation is **SUSTAINED, ADOPTED** and **INCORPORATED.**

IT IS FURTHER ORDERED that Petitioner's Application for Writ of Habeas Corpus is **DENIED.**

Dated this 18th day of February, 1993.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JIMMY ELEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:92CV1927
	)	(JCH) (TIA)
JAMES PURKETT,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the petition of Jimmy Elem for a writ of habeas corpus under 28 U.S.C. § 2254. This cause was referred to the undersigned United States Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b).

I. **Procedural History**

Petitioner stood trial for second degree robbery in July of 1986. An Assistant Public Defender represented petitioner at trial. A jury found petitioner guilty and the trial court

sentenced him to twenty five years in prison as a persistent offender.

Petitioner appealed his conviction on two grounds: (1) that the trial court erred in overruling petitioner's objection to the state's use of peremptory challenges to strike two black persons from the jury panel; and (2) that the trial court erred in overruling petitioner's motion for mistrial when it was discovered the jury had considered evidence of an uncharged crime during its deliberations. Another Assistant Public Defender handled petitioner's appeal, which the Missouri Court of Appeals for the Eastern District denied. State v. Elem, 747 S.W.2d 772 (Mo.App. 1988) (Resp. Exh. E). Petitioner did not pursue post conviction remedies in state court.

Petitioner is currently incarcerated at Farmington Correctional Center. He filed the instant petition for writ of habeas corpus on August 10, 1992. Because the petition is pro se, the Court must liberally construe the pleadings, Hill v. Wyrick, 570 F.2d 748, 751 (8th Cir), cert. denied, 436 U.S. 921 (1978). The petition lists ten points of alleged error:

I. petitioner asserts he received no Miranda warnings;

II. petitioner asserts there was insufficient evidence to convict him and that the trial court erred in admitting certain items of physical evidence;

III. petitioner asserts that he was convicted through the use of "incredibly bad police work";

IV. petitioner asserts that the trial court erred in refusing to declare a mistrial when it was discovered that the jury members found an unidentified item appearing to be a marijuana "joint" in a jogging suit admitted into evidence;

V. petitioner asserts that the trial judge abused his discretion by allowing "hearsay testimony" given by the jury foreperson concerning the basis for the conviction;

VI. petitioner asserts the prosecutor introduced evidence concerning two "un-known and/or alleged" witnesses, thereby depriving petitioner of the right to confront his accusers;

VII. petitioner asserts the trial court erred in overruling petitioner's objection to the prosecutor's use of peremptory strikes to remove black persons from the jury panel;

VIII. petitioner asserts that the prosecutor engaged in improper and prejudicial argument;

IX. petitioner asserts that his trial counsel was incompetent in failing to: (1) inspect the jogging suit;
(2) object to improper prosecutorial argument;
(3) request a lesser included offense instruction;

(4) discover the identity of the "unknown juror"; and
(5) object to the faulty information;

X. petitioner asserts that the original information charging him with Robbery in the Second Degree was fatally defective in that it did not indicate that he stole over $150.00.

Respondent concedes exhaustion of petitioner's claims but contends that all but two of the claims are procedurally barred due to petitioner's failure to present them to the state courts. Respondent also argues that the two claims petitioner did preserve on appeal are without merit.

Claims Not Raised in State Court

A state prisoner is not entitled to habeas relief unless he has exhausted the remedies available to him in state court. 28 U.S.C. § 2254(b). The Eighth Circuit explained the exhaustion doctrine in Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988). First, the District Court must determine whether the federal constitutional dimensions of the habeas corpus claims were fairly presented to the state courts. If not, the Court must determine whether the exhaustion requirement has been met because no non-futile state court remedies exist. The District Court must then determine whether or not adequate cause exists to excuse the failure to present the claims to the state courts. If sufficient cause exists, petitioner must demonstrate "actual prejudice to his defense resulting from the state court's failure to address the merits of the

claim." Id. at 296. The District Court must dismiss the habeas petition unless it survives each level of analysis.

Petitioner failed to present claims I, II, III, V, VI, VIII, IX and X to the state courts. Not only did petitioner neglect to raise the claims on appeal, he did not pursue a post conviction motion pursuant to Missouri Rule 29.15. As respondent points out, these claims are technically exhausted because petitioner has no currently available state remedies. This Court still cannot reach the merits of the claims, however, unless petitioner demonstrates adequate cause to excuse his state default and actual prejudice resulting from the default. Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, reh'g denied, 434 U.S. 880 (1977); Stokes v Armontrout, 893 F.2d 152, 155 (8th Cir. 1989). The federal court may excuse petitioner's failure to show cause and prejudice only where petitioner can "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice," Kennedy v. Delo, 959 F.2d 112, 115 (8th Cir. 1992) (quoting Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2565 (1991).

Petitioner has failed to assert either cause or prejudice with respect to his procedural default of any of these claims and has not shown any facts to warrant concern about a fundamental miscarriage of justice.[1] As such, claims I, II, III,

---

[1]The Supreme Court has recently articulated a new test for determining whether habeas petitioners have met the

V, VI, VIII, IX and X are pro-cedurally barred from review by this Court and should be dismissed. Stanley v. Jones, 973 F.2d 680 (8th Cir. 1992).

Claims Addressed on the Merits

Petitioner raised claims IV and VII both in his Motion for New Trial and on appeal in the Missouri courts. This Court will therefore consider the merits of those claims.

Ground IV

Petitioner asserts the trial court erred in failing to declare a mistrial when the court discovered that the jury found what appeared to be a "joint" or marijuana cigarette in a sweat suit admitted into evidence. Petitioner contends the "joint" amounted to evidence of an uncharged crime, and that the jury's exposure to such evidence warranted a mistrial.

"miscarriage of justice" standard. In order to have a procedurally defaulted claim evaluated on its merits when there has been no showing of cause and prejudice, the habeas petitioner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner (guilty) under the applicable state law." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992) (quoting Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 2515 (1992)).

The trial court, in considering petitioner's motion for new trial, heard the testimony of Gwyn Harvey, the jury foreperson:

> [Under direct examination by the Assistant Prosecuting Attorney]:
>
> Q. And you've listened to the argument just presented to the Court about something found in one of the pieces of evidence?
>
> A. I have.
>
> Q. What was--Do you know what was found?
>
> A. A white, rolled up, tubular looking, I don't know what it was.
>
> Q. In the discussions that occurred in the jury room on this case, what was said with regard to the thing that was found?
>
> A. Not everybody handled it, and people were not sure what it was. I personally thought it was just a piece of paper that had gotten rolled up in washing. Other people thought it was some kind of cigarette, a joint.

Q. Did anyone know whether it was marijuana?

A. Nobody knew.

Q. How much emphasis was placed on that piece--that thing that you are talking about right now, that rolled up piece of paper, whatever it may be, how much emphasis did the jury place on that in deliberations?

A. We didn't discuss that at all other than at the point in time at which it was found. Very little time was spent on it.

Q. And you were there for the entire deliberations and participated in them?

A. I was.

Q. Did the piece of paper in your opinion in any way, or whatever it was that was rolled up, let's say it was a cigarette, did the rolled up cigarette in any way in your opinion place--or was any emphasis placed on that in your deliberations in determining whether the defendant was guilty or not guilty?

A. Not at all.

(Resp. Exh. A-3 at 8-10). Based on Ms. Harvey's testimony, the trial judge denied the motion for new trial. (Resp. Exh. A-3 at 18).

After reviewing the transcript of the above noted evidentiary hearing to determine whether the "joint" had prejudiced petitioner, the Missouri Court of Appeals ruled that the trial judge's decision to deny petitioner's request for mistrial had been correct:

> The declaration of a mistrial is a drastic remedy that should be employed only in those drastic circumstances in which the prejudice to the defendant can be removed in no other way. The decision to declare a mistrial rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of abuse of discretion. State v. Burroughs, 740 S.W.2d 272, 274 (Mo.App. 1987). . . . [The state] made a strong case. We find no prejudicial error.

State v. Elem, 747 S.W.2d at 775. (Resp. Exh. E).

State court factual findings are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). Sumner v. Mata, 449 U.S. 539, 544-46 (1981). As the state court's finding of no prejudice is amply supported by the

record (See Resp. Exh. A-3), this Court should afford that finding due deference. Petitioner's fourth claim should be denied.

Ground VII

In his seventh claim for relief, petitioner contends the trial court erred in overruling his objections to the prosecutor's use of peremptory challenges to strike two of the three black persons from the jury panel. Under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), a criminal defendant establishes a prima facie case of discrimination in selecting the jury panel by demonstrating that the prosecution's use of peremptory challenges and other relevant circumstances raise an inference that the government excluded the individuals from the jury due to their race. In State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988), the Missouri Supreme Court held that the trial court must consider the prosecutor's explanation for striking the veniremen in determining whether there is a prima facie case of discrimination.

During the voir dire in this case, when the defense objected to the striking of the two black men from the jury panel, the prosecutor explained that the men were the only two individuals on the panel with facial hair, and that he did not like the way they looked (Resp. Exh. A-1 at 61). Additionally, the prosecutor noted that one of the men had been the victim of a supermarket robbery involving a

shotgun. The prosecutor reasoned, ". . . maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." Id. The trial court accepted the prosecutor's reasons for removing the potential jurors and overruled the defense objection. Id. at 62.

In reviewing the trial judge's decision, the Missouri Court of Appeals considered the law under Batson, Antwine, and two Eighth Circuit cases. The Court of Appeals determined that the prosecutor's reasons for striking the men constituted a legitimate "hunch" pursuant to Antwine: "The circumstances fail to raise the necessary inference of racial discrimination, and the court did not err in denying defendant's objection to the jury panel." State v. Elem, 747 S.W.2d at 775 (Mo.App. 1988) (Resp. Exh. E).

As noted above, this Court will afford a presumption of correctness to state court factual findings. State court Batson determinations are findings of fact entitled to such a presumption. Jones v. Jones, 938 F.2d 838, 841-43 (8th Cir. 1991). The record supports the Missouri Court of Appeals' finding of no purposeful discrimination (See Resp. Exh. A-1 at 58-62), and this Court will give the finding due deference. Petitioner's seventh claim should be denied.

Recommendation

For the foregoing reasons, the undersigned United States Magistrate Judge recommends that Jimmy Elem's

petition for writ of habeas corpus be dismissed without further proceedings.

The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation. The failure to file timely objections may result in the waiver of the right to appeal questions of fact. Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990).

/s/Terry I. Adelman
UNITED STATES MAGISTRATE JUDGE

Dated this 19th day of January, 1993

Missouri Court of Appeals,
Eastern District,
Division One.

March 29, 1988.

STATE of Missouri,
Plaintiff-Respondent,

v.

Jimmy Dean ELEM,
Defendant-Appellant,

No. 52142

REINHARD, Judge.

Defendant was convicted by a jury of second-degree robbery and was sentenced by the court as a persistent offender to 25 years in prison. He appeals; we affirm.

The victim, a black woman, was walking home from work on October 5, 1985, at about 11:00 p.m. A black man, wearing grey sweat pants, a grey, hooded sweat shirt, and white high-top tennis shoes jogged past her from behind, ran

ahead, and then turned and jogged toward her. She saw his face as he approached because the area was well-lighted. As he passed, he grabbed her, pulled her into an adjacent vacant building, and hit her. He demanded money and threatened her with a bottle he broke against a wall. She pulled away from him and ran back to the street, where he caught her purse, breaking its handle and snatching it from her. She again saw his face. He fled into a dead-end street and then south across a small park. The victim, along with two black women in a car who had seen the man steal the purse, followed him as far as the dead-end. The victim noticed the man had "french-braided" hair.

Officer John Bridges of the Wellston Police Department spoke to two black women in a car at the police station and again near a liquor store, which was a few blocks south of the scene of the incident. At the liquor store Bridges detained defendant, who was at the liquor store, asking for a clothes hanger to open his car; he said he had locked his keys in his car. Defendant was wearing cut-off blue jeans, a T-shirt, and white high-top tennis shoes despite the fact that the weather was "chilly," and he was the only person at the liquor store in shorts. Bridges noticed defendant was perspiring and his hair had french braids. He took defendant to the vacant building, the scene of the assault, where the victim, sitting in another officer's car, identified him as her assailant. Another officer found grey sweat pants, inside out and with burrs stuck to them, a grey, hooded sweat shirt, and the victim's purse under a car parked near the liquor store. The victim

identified the sweat pants and sweat shirt as those worn by the robber.

In his principal point on appeal defendant contends the court erred in overruling his objection to the state's use of peremptory challenges to strike black persons from the jury panel. He alleges this error led to a denial of his due process rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The venire consisted of 25 persons, including three blacks, jurors 16, 22, and 24. Each party had six peremptory challenges. The state struck two black males, jurors 22 and 24, and left on the panel a black female, juror 16. After defendant objected to the jury panel, the prosecutor indicated he struck juror 22 because of his shoulder-length, unkept, curly hair, which was "the longest hair of anyone on the panel," and because of his mustache and "goatee-type beard." Juror 24 also had a mustache and a goatee-type beard. The prosecutor stated he didn't "like the way they looked" and he believed they would not be good jurors. They were the only two on the venire who had facial hair. Further, juror 24 had been at a supermarket when a robbery had occurred, and a man pointed a sawed-off shotgun at him during the incident. The prosecutor said he did not want him on the jury in this case, which did not involve a gun, because he might feel that a robbery required a gun. The court denied the motion attacking the penal.

Under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722-23 (1986), a prima facie case of purposeful discrimination in the selection of a jury panel is established by showing that the government's use of its peremptory challenges and any other relevant circumstances "raise an inference that the prosecutor ... exclude[d] ... veniremen from the petit jury on account of their race." The Missouri Supreme Court first considered the *Batson* standard in *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), and held the trial court must consider the prosecutor's explanation as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges. *Antwine*, 743 S.W.2d at 64. The state may rely on the prosecutor's legitimate "hunches" and experience so long as race is not the motive. *Id.* at 65. This case was tried after *Batson* was decided but before the decision in *Antwine*.

In *United States v. Ingram*, 839 F.2d 1327 (8th Cir. 1988), a venire of 35 persons included two blacks. The prosecutor utilized one of six peremptory challenges to strike one of the two blacks. The defendant, a black man, moved for a mistrial based on the government's unconstitutional use of its challenges in violation of *Batson*. The district court denied the motion without requiring the prosecutor to provide an explanation for his strike. The United States Court of Appeals, Eighth Circuit, held that the trial court implicitly found the defendant had failed to establish a prima facie case as required by *Batson*. In affirming, the court said,

In this case, the defendant, in support of his argument that a prima facie case of discrimination has been established, relies solely on the fact that the prosecution struck one of two potential black jurors. The Eighth Circuit has said that "bare reliance on the fact that the government used one of its peremptory challenges to exclude one of the two black veniremen falls short of raising an inference of purposeful discrimination necessary to establish a prima facie case under *Batson*." *[United States v.] Porter*, 831 F.2d [760,] 767-68 (8th Cir. 1987)]. *See United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir.1987). We conclude that the facts and circumstances of this case likewise do not raise the necessary inference of discrimination and that the district court was correct in overruling the motion for a mistrial without further inquiry of the prosecutor.

Ingram, 839 F.2d at 1330 (footnote omitted).

Another eighth circuit case similar to the present case is *United States v. Montgomery*, 819 F.2d 847 (8th Cir. 1987). In *Montgomery* the court set forth the following facts:

There were a total of four black persons available for selection as jurors, making up 14% of the venire. The government used two of its six strikes (33%) to eliminate two of the four black members of the venire. The defendant then used one peremptory challenge to strike one of the two potential remaining black jurors, so that the actual jury consisted of eleven whites and one black.

Although the jury accepted by the government included two blacks, Montgomery asserts that these percentages indicate that black members of the jury panel were peremptorily struck at a rate in excess of double of that which a proportionate striking of blacks would have resulted in. He requests that his case be remanded pursuant to *Batson* for the district court to determine whether he has a *prima facie* case of purposeful discrimination and whether the government had permissible reasons for the strikes.

In rejecting the defendant's claim, the court of appeals said,

> The facts and circumstances in the present case do not raise such an inference of racial discrimination. The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury. *Batson* does not require that the government adhere to a specific mathematical formula in the exercise of its peremptory challenges. Accordingly, we hold that the district court did not err in denying Montgomery's motion to dismiss the jury panel.

Montgomery, 819 F.2d at 851 (citation omitted).

Here, the three blacks made up 12 percent of the panel, compared to the 14 percent in *Montgomery*. In both cases the government used 33 1/3 percent of its peremptory challenges to strike black veniremen. Moreover, additional factors support the trial court's ruling here that were not present in either *Ingram* or *Montgomery*. The victim was black, and the state gave an explanation. We believe the state's explanation constituted a legitimate "hunch." *See Antwine*, 743 S.W.2d at 65. The circumstances fail to raise the necessary inference of racial discrimination, and the court did not err in denying defendant's objection to the panel.

Defendant also contends the court erred in refusing to declare a mistrial when it was discovered the jury had considered evidence of an uncharged crime during its deliberations.

During trial the grey sweat pants and sweat shirt were admitted into evidence without objection. While the jurors were deliberating, the court permitted them to examine the clothing without objection. One juror apparently discovered a tightly rolled piece of paper in the pocket of the sweat shirt, which appeared to some jurors to be a "joint" or marijuana cigarette. The jurors informed the bailiff, and subsequently defendant requested a mistrial because the "joint" was evidence of a crime with which defendant was not charged. The court refused to declare a mistrial. It examined the

garments and the rolled paper, stating it was impossible to determine what the rolled paper was or if it was a "joint" and found defendant suffered no prejudice from the jury's consideration of the item.

Prior to sentencing, the court held a hearing on defendant's contention in his motion for new trial that the court erred in refusing to grant a mistrial based on the jury's discovery of the "joint." The state argued defendant had not been prejudiced by the discovery and presented the testimony of the foreperson of the jury, Gwyn Harvey.

The declaration of a mistrial is a drastic remedy that should be employed only in those extraordinary circumstances in which the prejudice to the defendant can be removed in no other way. The decision to declare a mistrial rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Burroughs*, 740 S.W.2d 272, 274 (Mo.App.1987).

The circumstances here are similar to those in *State v. Beasley*, 731 S.W.2d 255 (Mo.App.1987). In *Beasley*, during its deliberations, the jury examined an overnight bag carried by defendant and inside it found some seeds and leaves, which some jurors speculated were tobacco or marijuana. We found no prejudicial error in the trial court's refusal to declare a mistrial after conducting a special voir dire of the jury panel. *Beasley*, 731 S.W.2d at 256-57. Although the trial court in *Beasley* held a more extensive hearing on the issue

than did the trial court here, in substance we held in *Beasley* that the defendant suffered no prejudice because of the strength of the state's case. *Id.* at 257. The state in this case also made a strong case. We find no prejudicial error.

Judgment affirmed.

GARY M. GAERTNER, P.J., and CRIST, J., concur.

State of Missouri)
)
v.) Cause No. 539718
) Court of Appeals
Jimmy Dean Elem) No. 52142

Transcript on Appeal

Page 58

(The Court convened at 3:15 p.m., and the further following proceedings were had:)

THE COURT: Gentlemen, is the jury that is seated, the jury that you have selected?

MR. LARNER: Yes, Judge.

MR. GOULET: May we approach the bench, Judge.

THE COURT: You may.

(Counsel approached the bench and the following proceedings were had:)

MR. GOULET: Your Honor, the defendant at this time would make the motion that this is not a jury of the defendant's peers and that –

THE COURT: This is the jury you have selected?

MR. GOULET: That the State has struck --

THE COURT: Let me get you on the record, this is the jury you have selected?

MR. GOULET: Yes, it is, your Honor.

THE COURT: All right.

MR. GOULET: The State has made preemptory [sic] strikes of two of the three eligible blacks on this jury panel. And, therefore, we consider that prejudice to the defendant's case.

THE COURT: Well, I don't know whether or not the State has struck whites or blacks, because I have no recollection of the color of any of their strikes. But, Mr. Larner, you may want to respond to that.

MR. LARNER: Well, that there has been no finding that I struck in that regard, I don't have to respond. However, I will respond, because it is an inaccurate statement by the defense. There appears to me, as I look at the jury right now, that there are black people on the jury which I did not strike. Mr. Goulet is saying that I struck jurors that were black, he said two of three. I don't believe there is any record to indicate how many black people there were on the

panel before we started. But to respond to this, I don't know which jurors he is referring to that he says that I struck.

MR. GOULET: May I get my jury list?

THE COURT: You may do so.

MR. GOULET: In the first twenty-five venire people[,] three were black. The first being Ms. Kemp-Jones, number sixteen. The second one being Mr. Tommy Moody, number twenty-two. And the third being Mr. William Hunt, number twenty-four. Those were the available panel and the State has struck two out of those three. Those being number twenty-two, Tommy Moody, and number twenty-four, William Hunt.

MR. LARNER: In response, your Honor, I don't think there has been any evidence that any statements by the people on the voir dire as to whether or not they were black. I think that he is referring to, he says number sixteen, number twenty-two, and number twenty-four. I don't know if all three of those people are, in fact, black. There has been no testimony to that and the fact now whether or not they are what he said was inaccurate, because number sixteen I did not strike, that's a female.

MR. GOULET: I think my statement was that he struck two out of three. That's not inaccurate, he kept one.

MR. LARNER: Your Honor, I don't know that there is any evidence that there were three on the panel. Now, I am saying that Shaun Goulet just said there was [sic] number sixteen, number twenty-two and number twenty-four, that he is assuming are black. Those are the three he mentioned. I did not strike number sixteen. I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkept hair. Also, he had a mus-tache and a goatee type beard. And juror number-twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case.

MR. GOULET: May I respond, your Honor?

THE COURT: Yes.

MR. GOULET: Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record if the Court would like to call up these two individuals to ask them if they are black or will the Court take judicial notice that they are black individuals?

THE COURT: I am not going to do that, no, sir.

MR. GOULET: Okay. Nothing further.

MR. LARNER: Your Honor, I will state and ask the Court to look at the first twenty-four people on the jury panel that numbers twenty-two and twenty-four are the only people with facial hair, that is, a mustache or a beard. And twenty-two and twenty-four both have mustache and beard.

THE COURT: All right.

(The proceedings returned to open court.)

THE COURT: Those of you that were not selected to serve in this case we are going to excuse you at this time and send you back up to the sixth floor to the jury assembly room for reassignment in a matter. Before you go, however, on behalf of the parties and their attorneys and this Court, I would like to thank each of you for coming down here.

Obviously, it is a physical impossibility to seat the thirty-four that we call down into that jury box that is designed to hold fourteen individuals, but it was absolutely essential that we call thirty-four of you for the system to function. Again, thanks for coming down. Now, we will send you back up to the sixth floor for reassignment.

Now, ladies and gentlemen, with the exception of Mr. Braun and Ms. McClain, will the jury please rise and raise your right hand and be sworn.

(The jury selected to try the case was duly sworn by the Clerk of the Court.)

THE COURT: Now, Mr. Braun and Ms. McClain, we have a special oath for you. If you will please rise and raise your right hand.

(The alternate jurors were duly sworn by the Clerk of the Court.)

[Pages 58-63 of the Transcript on Appeal in State of Missouri vs. Jimmy Dean Elem, No. 539718, Court of Appeals No. 52142, Division No. 6, Circuit Court of the County of St. Louis, the Honorable Robert W. Saitz presiding]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1793EMSL

Jimmy Elem,	*	
	*	
Appellant,	*	
	*	Order Denying
vs.	*	Petition for
	*	Rehearing and
James Purkett,	*	Suggestion for
	*	Rehearing En Banc
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Beam, and Judge Morris Sheppard Arnold would grant the suggestion.

The petition for rehearing by the panel is also denied.

July 28, 1994

Order Entered at the Direction of the Court:

--Michael E. Gans--
Clerk, U.S. Court of Appeals, Eighth Circuit

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

Name: JIMMY DEAN ELEM
Prisoner No. 157650
Case No. 4:92CV001927
Place of Confinement: FARMINGTON CORRECTIONAL CENTER

Name of Petitioner (include name under which convicted) JIMMY DEAN ELEM V. (Name of Respondent (authorized person having custody of petitioner) JAMES PURKETT, et al.,

The Attorney General of the State of Missouri: WILLIAM WEBSTER

PETITION

1. Name and location of court which entered the judgment of conviction under attack: CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, DIVISION NO. 6

2. Date of judgment of conviction: JULY 30, 1986

3. Length of sentence: 25 YEARS

4. Nature of offense involved (all counts): ROBBERY IN THE SECOND DEGREE

5. What was your plea? (Check one):
(a) Not guilty X
(b) Guilty ___
(c) Nolo contendere ___

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury X
(b) Judge only ___

7. Did you testify at the trial?
Yes ___ No X

8. Did you appeal from the judgment of conviction?
Yes X No ___

9. If you did appeal, answer the following:

(a) Name of court: MISSOURI COURT OF APPEALS, EASTERN DISTRICT

(b) Result: AFFIRMED

(c) Date of result and citation, if known: MARCH 29, 1988

(d) Grounds raised: POINT I. VOIR DIRE, POINT II. INADMISSIBLE EVIDENCE OF AN UNCHARGED CRIME

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and citation, if known: n/a

(4) Grounds raised: n/a

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and citation, if known: n/a

(4) Grounds raised: n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ___ No. X

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: n/a

(2) Nature of proceeding: n/a

(3) Grounds raised: n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No. X

(5) Result: n/a

(6) Date of result: n/a

(b) As to any second petition, application or motion give the same information:

(1) Name of court: n/a

(2) Nature of proceeding: n/a

(3) Grounds raised: n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No. X

(5) Result: n/a

(6) Date of result: n/a

(c) Did you appeal to the highest state court having jurisdiction the result ofaction taken on any petition, application or motion?

(1) First petition, etc.
Yes X No ___

(2) Second petition, etc.
Yes ___ No ___ n/a

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: n/a

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SEE ATTACHED PAGES
Supporting **FACTS** (state *briefly* without citing cases or law): SEE ATTACHED PAGES

B. Ground two: SEE ATTACHED PAGES
Supporting **FACTS** (state *briefly* without citing cases or law): SEE ATTACHED PAGES

[————————————————
Petitioner's added pages in petition——]

12. **a. Ground one:** No Miranda before, after, during, and/or prior to petitioner[']s arrest. This contention is best supported by the in court testimony of the official record. to-wit:

1. Transcript of Appeal, June 12, 1986 - page 8, line 9; goes to petitioner's state of mind and belief at the time, pages 21 - 23.

2. Trial Transcript, of July 27, 1986 - pages 71 - 73, 98, 203, 207 - 209, 224, 276 - 277, 281, and 292 (State's Opening Statement).

3. Defendant's Motion to Suppress Statements at pages 10 - 12 of petitioner's Legal File. to-wit:

Supporting **FACTS:** **MOTION TO SUPPRESS STATEMENTS** The petitioner, by and through his attorney, and moves the court to suppress all alleged statements, oral, written, videotaped or otherwise recorded, which the State intends to use in evidence against the petitioner.

PETITIONER INCORPORATES BY REFERENCE SECTIONS A AND C OF THE ABOVE-

STYLED MOTION AND A PART OF PETITIONER'S OFFICIAL LEGAL FILE.

B. Said statement(s) was made without the petitioner first being advised of his constitutional rights, to-wit:

1. Petitioner was not advised in clear and unequivocal terms of his right to remain silent prior to his interrigation [sic].

2. The petitioner was not advised that anything that he said could and would be used against him in a court of law.

3. The petitioner was not advised of his right to consult with a lawyer and to have a lawyer present with him during the interrogation.

4. Petitioner was not advised that a lawyer would be appointed for him if he was indigent.

5. Petitioner did not waive his right to remain silent, or his right to counsel, or his right to to [sic] have counsel appointed to him.

6. The interrogation by said police officers did not cease when petitioner indicated that he wished t [sic] to remain silent, and that he

desired to have appointed counsel present on his behalf at said interrogation.

Petitioner asserts that he would like for this Court to consider this point in connection with petitioner's claim of the bad police work in this case. Petitioner would also like to add another important element leading up to all the bad police work and the blatant violation of petitioner's most basic and fundamental rights and the **arresting officer, was a "Reserve " officer.** Which petitioner asserts and/or contends is a mitigating factor of both the bad police work and his failure to timely and/or properly mirandize the petitioner.

All of the matters herein mentioned were in violation of the constitutional rights of the defendant/petitioner under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and under Article I, Section 19 and Article I, Section 10 of the Missouri Constitution.

12. B. Ground two: INSUFFICIENCY OF THE EVIDENCE: Petitioner asserts that there exist both irrefuttable [sic], contradictory and inconsistent testimony at the state court as to the material facts and/ or in the evidence presented in this cause of action now before the Court. That unequivocally gives rise to a valid claim of a travesty on injustice herein. When this cause is decided on each of the claims (9) raised herein; and/or each are [sic] considered

herein in an overall and/or the cumulaive [sic] effect, as to the or any final outcome. to-wit:

Petitioner challenges:

A.) Chain of custody as to State's Exhibits 1, 2, and 3;

B.) Lack of inculpatory evidence, (i.e. no whiskey bottle, no fingerprints);

C.) (Un)Reliability of the out-of-court identification (i.e. facial, voice, hair, and lighting);

D.) Comparative contradictory and/or inconsistent versions in testimony as to the material facts as to what actually happen[ed] in this case. to-wit:

Supporting **FACTS:**

A.) Petitioner seeks to challenge the chain of custody as to State's Exhibits 1 and 2 (jogging suit) and 3 (victim[']s purse).

Petitioner asserts the trial court erred in admitting into evidence the sweat-pants, sweat-shirt, and the handbag as there was no proper foundation laid. In addition, the trial court erred in admitting said items into evidence as said items lacked proper chain of custody. Said errors on the part

of the trial court resulted in a violation of petitioner's rights to due process and equal protection under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Subsections 10, 15 and 18 (a) of the Missouri Constitution and the Missouri Supreme Court Rules of Criminal Procedure.

Petitioner relies upon the:

1. Trial Transcript, of July 27, 1986 - at page 79, 99, 128, 139, 184, 216 -217, 245 -246, and 255;also, at page 77; on Direct Examination: of Police Officer GROH, " ... No forensic test conducted of evidence, jogging suit, or purse ... see also pages 78, 91-92, 108-111, and 196-198...".

B.) Petitioner seeks to challenge the lack of any inculpatory evidence; such as no whiskey bottle or no fingerprints that when testimony was offered into evidence that petitioner threaten[ed] to beat the victim with, bust her head with, or he would kill her with this alleged object. A most critical piece of inadmissible evidence and/or testimony that was allowed to prejudice petitioner's trial. Petitioner asserts that because the State introduced this evidence and/or testimony that the State has open[ed] up the door for rebuttal and challenge. Petitioner asserts had this critical evidence been properly preserved and entered into evidence at trial; then the petitioner could have just as easily utilized it to his advantage; for which evidence could have just as easily exonerated the petitioner.

PETITIONER relies upon the:

1. Trial Transcript, of July 27, 1986 - at pages 101 - 102, 125, 147 -150, 164, 186, 191, 216 -217, 246, and 268 - 269;

2. Legal File, at page 15:(i.e. Defendants motion to suppress physical evidence is **sustained...**).

C.) Petitioner seeks to challenge the unreliability and/or the questionable out-of-court identification of petitioner (i.e. facial, voice, hair, and inadequate lighting). In that there exist in the official transcripts numerous and/or too many critical and prejudicial contradictions and inconsistencies in the version as to the actual chain of events that led up to petitioner's suggestive and tainted identification. to-wit:

Petitioner relies upon the:

1. **Transcript** for the Purpose of Appeal, June 12, 1986 - at pages 11 and 24;

2. Transcript at Trial, July 27, 1986 - at pages 136, 141, 143, 145, 149-152, 165, 155-158, 160, 165, 172 (vs. 234), 174, 228, and 235-236; 253-254, 262, and 267; and 75, 288, and 291 (States Opening Statement);

3. Transcript of Appeal, August 29, 1986 - at page 10.

Petitioner asserts and hopes to show how the victim[']s in-court testimony about petitioner's hair, was a key identifying feature (Tr. p. 151) is inconsistent and contradicts the victim[']s handwritten police report. Victim's in-court testimony has been both rehearsed and embellished with the assistance of the State (Tr. page 160-161 and 174).

D.) Petitioner seeks to challenge the critical and prejudicial contradictory and inconsistent versions of all the witnesses in-court testimony; as to their version of the chain of events that led up to petitioner's illegal conviction. to-wit:

Petitioner relies upon the:

1. Trial Transcript of July 30, 1986 - at pages 79-80, 89-90, 98-100,(vs. 196-197), 108-109 (vs. 230), 149-153,155, 158, 167,(vs. 244-245), 169 (vs. 251), 169 and 251 (vs.229).

[----------
back to Petition form----------]

[12] C. Ground three: SEE ATTACHED PAGES
Supporting FACTS (state *briefly* without citing cases or law):
SEE ATTACHED PAGES

D. Ground four: SEE ATTACHED PAGES

Supporting FACTS (state *briefly* without citing cases or law):
SEE ATTACHED PAGES

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ALL PETITIONER'S GROUNDS RAISED HEREIN WITH THE EXCEPTION OF PETITIONER'S CHALLENGE OF VOIR DIRE, POINT 7 AND INADMISSIBLE EVIDENCE OF AN UNCHARGED CRIME, POINT 4.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ___ No X

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: SHAWN GOULET, ADDRESS UNKNOWN

(b) At arraignment and plea: SHAWN GOULET, ADDRESS UNKNOWN

[----------

Return to added pages by petitioner---]

12. C. **Ground three:** Petitioner seeks to challenge the incredibly **bad police work** in this case or the minimal degree of and/or lack of police work done in this case. Petitioner also presents this Court with the question of just how deficient or bad does the police work have to be " **before** " it rises to or is rendered to be a violation of Petitioner's protected constitutional rights? In that, in the instant case; these are critical and crucial factors to be considered:

Supporting **FACTS:**

(a) The arresting officer was only and at best, " **a Reserved**U" officer and has admitted in-court that he had worked sixteen (16) hours the day of petitioner's arrest (at his other job) and which may explain; the why of (b);

(b) The arresting officer failed to mirandize petitioner of his constitutional rights;

(c) The[re] was no investigation conducted in this case (i.e. fail to preserve identification of two black female witnesses, no evidence of

whiskey bottle or fingerprints collected, fail to properly inspect State's Exhibit's [sic] 1 and 2 (jogging suit) for proof of ownership, and the fact that six (6) or seven (7) seperate [sic] police officers were involved in petitioner's arrest and only one (1) single police report was filed.).

1. Transcript Purpose of Appeal, June 12, 1986 at pages 18 - 21;

2. Transcript at Trial, July 27, 1986 - at pages 97, 99-102, 108-110, 164, 171, 186, 196, 198, 205, 215, 222, 225, 233, 239-240, 252, 261, 265-266, 304-305, and States Opening Argument (v. 296-297) and States Closing Argument (v. 297-298);

3. Transcript on Appeal, August 29, 1986 at pages 4-5 and 14-17.

12. **D. Ground four:** Prejudicial evidence of an uncharged crime and outside the scopr [sic] of pleadings - Marijuana that was discovered and being allowed into evidence; " **after** " jury retired for deliberations. Petitioner states that when the jury had retired for its deliberations.

Supporting **FACTS:** At 10:05 a.m. (T.301) and at 10:35 a.m. the jury requested the State's Exhibits 1 and 2, the jogging suit [top and bottom] and it was sent in to them (T.305).

While examining the sweat shirt one of the jurors discovered what appeared to be a marijuana cigarette of " **joint** " in one of the pockets (S.11). When the bailiff (Mr. Enright) entered the jury room to deliver lunch at approximately 12:15 p.m., one of the jurors (i.e. allegedly unknown) told him, **"We found a ' joint ' in the jogging suit"** (T.306). Before the jury returned it[s] verdict, and more importantly, prior to the jury finding this prejudicial and incriminating evidence, the jurors **stood seven to five for acquittal** (Tr. App. 6 and 14). Before the jury returned its verdict, petitioner learned of the jury's discovery and made a motion for mistrial (Tr. 302). The motion was overruled (Tr. 305). Petitioner relies further on the facts that are delineated in the body of his arguments of his Appeal Brief at pages 9 thru 13.

Petitioner asserts that the trial court erred in overruling petitioner's Motion for Mistrial, when timely raised. For this is clearly evidence of an uncharged crime and is highly prejudicial and inflammatory. This type of evidence, of an uncharged crime, is inadmissible and irrelevant and caused the jury to convict petitioner on an improper basis. Said error of the trial court directly led to a denial of petitioner's due pro-cess rights under the Fourth, Fifth, Sixth, and Fourteenth Amendment to the United States Constitution, and Article I., Subsections 10, 15, and 18 (a) of the Missouri Constitution.

PETITIONER RELIES UPON THE:

1. Transcript Purpose of Appeal, June 12, 1986 - at pages 1-2, 6, 14, and 23-25;

2. Trial Transcript of July 30, 1986 - at pages 302-318;

3. Transcript on Appeal, August 29, 1986 - at pages, in its entirety and directing this Court's attention to pages 6 and 7. and page 11 (bottom) and page 12 (top).

12. E. Ground five: Petitioner seeks to challenge the trial court's abuse of discretion. In that, the trial court seen [sic] fit to allow the State to call the Jury Foreperson, a Gwyn Harvey to testify as to what other jury members thought and for what evidence did they base their decision to convict petitioner. Petitioner asserts that the Court has abused its discretion in allowing said witness to offer hearsay testimony in this cause.

PETITIONER RELIES UPON THE:

1. Trail [sic] Transcript of July 30, 1986 - at pages 305 (bottom line) and thru page 307;

2. Transcript of Appeal, August 29, 1986 - at pages 11 and 12.

Supporting **FACTS:** Petitioner asserts that our present contention and argument is; if, it was vital and/or so

important enough for the State to call the Jury-foreperson, Gwyn Harvey to defend his position? Then it was as equally important and/or essential for the petitioner to have the opportunity to defend against and/or refut[e] any testimony or evidence being offered into evidence by the State. Further, we submit that petitioner could and should have been able and/or permitted to call both the court bailiff, Mr. Enright and " the unknown juror " into court to offer testimony to resolve these facts still in doubt [] based upon a legal theory of guilt must be proven beyond a reasonable doubt)...

12. F. Ground six: Petitioner seeks to challenge the trial court's abuse of discretion. In that, the trial court seen [sic] fit to allow the State to illicit [sic] testimony of " unknown and/or alleged " of witnesses that were critical to petitioner['s] apprehension and arrest. All testimony offered into evidence of the two unknown black female witnesses goes to " hearsay " and is inadmissible. Having said admission to deny petitioner his mostabasic [sic] and fundamental right to confront his accusers.

PETITIONER RELIES UPON THE:

1. Transcript Purpose of Appeal, June 12, 1986 - at pages 4-9, 19-21, and 24;

2. Trail [sic] Transcript of July 30, 1986 - at pages 63-68, 130-134, 202-203, 205, 225-225, State's Opening

Statement, 70, State's Opening Argument, 289, 294, and 297, State's Closing Argument, 299;

3. Legal File, Motion To Suppress Identification, pages 13-14 and Motion In Limine, pages 16-17.

Supporting **FACTS:** Petitioner asserts that said out-of-court identification was the product result and " fruit of the poisonous tree " thus making petitioner's arrest unlawful. Petitioner further contends that the circumstances surrounding the said out-of-court identification were so inherently suggestive and conducive to mistaken identification as to violate due process under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 15, and 18 (a) of the Missouri Constituion [sic]. The testimony of said witnesses as to any in-court identification has been fatally infacted [sic] by the tainted out-of-court identification, and as such is merely a product of that improper out-of-court identification.

Petitioner timely filed his objections (i.e. motion in limine) to exclude any testimony the state may introduce on what two black females did or said. These two black **unidentified** females are not named in any police report and are not endorsed as state's witnesses. Any statements made by these two **unidentified** black female identifying the petitioner as the perpetrator of the present offense goes directly to the issue of identification and hence guilt of the petitioner. Moreover, it will be used solely for the truth of the

matter asserted that being the identification of petitioner as the perpetrator of the crime herein charged. Further, it is in direct violation of defendant/petitioner's constitutional rights of confrontation of this accusers. The probative value of any such testimony is clearly outweighed by its prejudicial effect on the petitioner. If the petitioner had been granted a sustained objection; at trial, this would have been insufficient protection for the petitioner. The jury would have been unable to seperate [sic] the issues; in an effective legalgistic [sic] context.

12. **G. Ground seven:** Petitioner asserts that timely objections were made at trial; that this is not a jury of the defendant[']s peers (Tr. 58). The trial court erred in overruling petitioner's objection to the state's striking veniremen or persons Number 22, Tommy Moody, and Number 24, William Hunt were two of three balck [sic] persons in the pool of venirepersons. Allowing the state to strike two of the three black venirepersons denied the petitioner a trial by a jury composed of his peers. Said error on the part of the court led to a denial of petitioner's due process rights under the Fourth, Fifth, Sixth, and Fourteenth Amendment to the United States Constitution.

PETITIONER RELIES UPON THE:

1. Trial Transcript of July 30, 1986 - at pages 10, 14-15, 23, 26-27, 30, 35, 39, 42, 58, and 61-62;

2. Legal File, Defendant's Motion For New Trial - at page 34;

3. Appeal Brief, at pages 7-9. Petitioner relies on the facts that are delineated in the body of his argument of his appeal brief.

Supporting **FACTS:** The trial court erred in overruling petitioner's objection to the State's use of peremptory challenges to strike black persons from the jury panel. This error led to a denial of petitioner's due process rights. Petitioner also challenges other questionable and/or suspect nature of several other jurors participation in his trial?

12. H. Ground eight: Petitioner asserts that the State's Prosecutor, Mr. Larner knowingly and willingly engaged in improper arguments of evidence that they reasonably should have known were erronous [sic]. Petitioner asserts that said references were a calculated strategy to mislead the jury. Knowing full well that said references were both prejudicial and inflammatory.

PETITIONER RELIES UPON THE:

1. Trial Transcript of July 30, 1986 - at pages 69, 75, 101, and 125, State's Opening Argument, page 291

Supporting **FACTS:** The in-court testimony during the State's opening Statement, where the State improperly argued highly

inflammatory and extremely prejudicial statements and/or made several comments to facts of an uncharged crime, outside the scope of pleadings and clearly not in evidence.(i.e. alleged threats to rape...).

The in-court testimony during the State's Opening Argument, where the State improperly argued highly inflammatory and extremely prejudicial statements and/or comments to facts not in evidence.(i.e. as to the number of people that allegedly saw petitioner wearing State's Exhibit 1 and 2...).

Petitioner's present contention is that there is absolutely no corrobative [sic] evidence, documentation, or testimony to support State's erroneous claims. That anybody other than the alleged vistim[sic], and two alleged unidentified black female witnesses saw petitioner wearing said same. And one and two makes three; not six. Petitioner further asserts this to be a calculated reference to facts not in evidence. And meant for the sole purpose to mislead the jurors as to the incriminating ownership of State's Exhibits 1 and 2. Petitioner asserts that without the State must have known it would have made for a much weaker case for the State. Petitioner asserts that out of all the crowd of people, on the streets and that was on the parking lot; no one saw petitioner throw the jogging suit under the car. The State has failed to produce any witnesses whatsoever that saw petitioner throw the jogging suit under the car; as state erroneously alleges.

Petitioner also asserts that " all " the Prosecuter's [sic] Opening and Closing Statements and Arguments; all references that the Prosecuter [sic] makes or made to anything petitioner may of [sic] said " before " his arrest and/or mirandized is inadmissible and improper argument(s).

12. I. Ground nine: Petitioner seeks to challenge the incompetency of trial counsel. In that counsel has failed to act in petitioner's best interest at all stages of the proceedings. Petitioner asserts that trial counsel has failed to perform the customary skills of a reasonably competent attorney would have performed under similar circumstances. That trial counsel has not represented petitioner with the degree of diligence and/or as zealously as he should have.

PETITIONER RELIES UPON THE:

1. Transcript Purpose of Appeal, June 12, 1986 - at pages 5, 11, 12, and 14;

2. Trial Transcript of July 30, 1986 - at pages 209-210, 242, 305-306, State's Opening Argument, 286-287, 291.

Supporting **FACTS:**[] Petitioner asserts that trial counsel was incompetent for these reasons:

(1) Trial Counsel failed to inspect State's Exhibit 1 and 2. Which permitted the discovery of evidence of an uncharged crime...

(2) Trial counsel failure to timely object and/or preserve for appeal; the Prosecuter's [sic] improper argument during his opening statement/argument (T. 69) that petitioner tried to rape victim...

(3) Trial counsel failed to show or establish from the in-court testimony that " no robbery " or prima facie case exist, via., in-court testimony that all victim's property was still in her purse, State's Exhibit 3. Petitioner contends that at best, trial counsel could have and should have timely request the appropriate " **lesser included offense jury instruction** " (i.e. purse-snatching)...

(4) Trial counsel failed to fully investigate petitioner's cause in a diligent and/or effective manner; in preparation of petitioner's Sentencing Hearing. That a reasonably competent attorney would have discovered who " the unknown juror " was that was so vital to petitioner's proven his cause, as it pertains to the evidence of an uncharged crime...

(5) Trial counsel failed to make numerous and timely objections and to preserve each of these

issues for appeal; of the prosecuter's [sic] improper arguments... and where prosecuter [sic] defines " **reasonable doubt.".**

(6) Petitioner without waiving any additional grounds of incompetency of trial counsel; he will leave this list incomplete, until such time this Court appoints counsel to file an amended complaint or until such time petitioner files an amended complaint...

(7) **Petitioner incorporates by reference his Challenge of his information,**
12. J. Ground ten... (next page)

12. J. Ground ten: Petitioner seeks to challenge the original information in this cause and at page -1 - of his legal file. Petitioner asserts that the information is fatally defective and does not fully set forth a prima facie case for which petitioner is and was charged.

Supporting **FACTS:** Petitioner asserts that petitioner's information is totally void of the essential elements of what constitutes " a felony " against the State of Missouri.(i.e. stealing of $150). Petitioner's Information reads as follows:: [sic]

" The Prosecuting Attorney of the County of St. Louis, State of Missouri, charges that the

defendant in violation of Section 569.030, RSMO. Committed the Class B Felony of Robbery in the Second Degree, punishable upon conviction under Section 558.011.1 (2), RSMO, inthat [sic], on or about Saturday, October 5, 1985 between 11:05 p.m. and 11:16 p.m. at 1900 Kienlen, in the City of Hillsdale, in the County of St. Louis, State of Missouri, the defendant forcibly stoleaa [sic] ladies purse, containing U.S. Currency and personal papers, owned by Colette Marie Johnson.".

All matters herein mentioned were in violation of the constitutional rights of the petitioner under the Fifth, Sixth, and Fourteenth Amendment and the due process Clause of the United States Constitution and Article I, Section 19, and Article I, Section 10 of the Missouri Constitution.

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return to Petition form----------]

[15](c) At trial: SHAWN GOULET, ADDRESS UNKNOWN

(d) At sentencing: SHAWN GOULET, ADDRESS UNKNOWN

(e) On appeal: PAUL MADISON, ADDRESS UNKNOWN

(f) In any post-conviction proceeding: n/a

(g) On appeal from any adverse ruling in a post-conviction proceeding: n/a

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ___ No. X

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes X No. ___

(a) If so, give name and location of court which imposed sentence to be served in the future: UNITED STATES DISTRICT COURT, EASTERN DISTRICT

(b) Give date and length of the above sentence: DECEMBER 19, 1986, 2 YEARS

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ___ No X

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

None - pro se -

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 6, 1992

(date)

Jimmy D. Elem-

Signature of Petitioner

No. 94-802

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

James Purkett, Superintendent
Farmington Correctional Center.....Petitioner
vs.
Jimmy Elem.....Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David E. Woods
Attorney at Law
Missouri Bar Enrollment Number 28779
Counsel of Record

300 Fort Zumwalt Sq., Ste 110
O'Fallon, MO 63366
(314) 978-4187

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

WHETHER A VENIREPERSON'S INDIVIDUAL CHARACTERISTIC OF APPEARANCE CONSTITUTES A LEGALLY SUFFICIENT NON-RACIAL REASON AND A NON-PRETEXTUAL REASON FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE UNDER HERNANDEZ V. NEW YORK, 111 S.Ct. 1859 (1991).

The Court of Appeals for the Eighth Circuit in deciding this case has not overlooked or misconstrued a significant issue, that issue being whether the state prosecutor presented a racially neutral reason which was not a pretext for striking African-American jurors from the jury panel where the defendant was an African-American.

The Court's Opinion does not conflict directly with Batson v. Kentucky, 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986), or its progeny, Hernandez v. New York, 111 S.Ct. 1859 (1991).

The Court's opinion is based upon a correct interpretation of the facts of the record below and a correct application of the law of the United States of America.

The Petitioner states that the Court of Appeals incorrectly analyzed the second and third steps involved in making a Batson challenge and incorrectly finding the state had made an improper use of the peremptory challenge in a manner violating the equal protection clause of the Fourteenth Amendment of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986).

The Petitioner has alleged that the Court of Appeals' method of review in the case at bar conflicts with Courts

from other Circuits. The Court of Appeals applied the correct legal standard in this review of the prosecutor's use of peremptory challenges.

Hernandez v. New York, 111 S.Ct. 1859 (1991), sets out the three steps involved in a Batson challenge as follows:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Id. at 96-97, 106 S.Ct. at 1722-1723. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Id. at 97-98, 106 S.Ct. at 1723-1724. Finally the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Id. at 98, 106 S.Ct. at 1723.

The Petitioner admits the Panel correctly applied Hernandez concerning the issue of whetner the Respondent made a prima facie case.

The Petitioner has stated the Court of Appeals incorrectly blurred the second and third steps of a Batson Challenge.

The Petitioner finds no fault with how the Court of Appeals has applied the first step of the Batson decision. The Petitioner has conceded the Respondent has made a prima facie showing the prosecutor exercise a peremptory challenge on the basis of the race of the defendant. Petitioner is an African-American man. (Petitioner's Appendix A-2). The prosecutor at trial used peremptory challenges to strike two (2) African-American jurors. (Petitioner's Appendix A-3).

Doss v. Frontenac, 14 F.3d 1313 (8th Cir. 1994) held

once the objecting party makes a prima facie showing, the burden shifts to the challenging party to offer a race-neutral reason for challenging the minority juror that is "clear and reasonably specific" and related to the case to be tried, quoting from Batson, 476 U.S. at 98, 106 S.Ct. at 1724.

Batson is significant in the jury selection process because of the obligations it creates for the government.

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, "as long as that reason is related to his view concerning the outcome of the case to be trial," the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Id. 476 U.S. at 89, 90 L.Ed. 2d at 83 (13.14a).

As the Court of Appeals correctly notes the ability to perform the duties of the juror is the basis of whether or not a person should serve or not serve upon a jury. The United States Supreme Court in Batson, 476 U.S. at 87, declared

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant on the excluded juror to touch the entire community. Selection procedures that purposely exclude black persons from juries undermine public confidence in the fairness of our system of justice.

The Petitioner states the Court of Appeals failed to correctly apply Hernandez in the case at bar. Batson requires for its second step, the prosecutor must articulate a race-neutral explanation for striking the jurors in question. The Court of Appeals correctly states the second

requirement of Batson:

> Once the Defendant makes a prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation for the peremptory strikes. (Petitioner's Appendix A-7)

The main thrust of the Petitioners argument is found on Page 15 of the Petitioner's Petition for Writ of Certiorari in which the Petitioner writes, "Since no discriminatory intent was inherent in the prosecutors explanation, [t]he proffered reason should be deemed race-neutral."

The Court of Appeals correctly found

> In the present case, the prosecutor's comments, "I don't like the way (he) look(s), with the way the hair is kept...And the mustache and the beard looks suspicious to me

do not constitute a legitimate race-neutral reasons for striking juror 22. (Petitioner's Appendix A-11).

The Court of Appeals correctly applied the second step of Batson, which requires the burden shift to the prosecutor to articulate a race-neutral explanation for striking the juror's in question, when it held

> in such a case as this, where the prosecution strikes at a prospective juror who is a member of defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in a particular case, the prosecution must at least articulate some plausible race-neutral reason for deleting those factors will somehow affect the person's ability to perform his or hers duties as a juror. (Petitioner's Appendix A-11)

The prosecutor in the case at bar explained, "I don't like the way they looked." (Petitioner's Appendix A-41) and

because their mustaches and beards looked suspicious to him. (Petitioner's Appendix A-41). The prosecutor's statement that he did not like the way the two African-American jurors looked was a pretext for discrimination. However, once this reason was given, the Court was correct in its observation that a judge could decide that the reason given was a pretext. This leads to the third step of the analysis, when the judge must decide whether to believe the proffered reason, or to find that purposeful discrimination has occurred.

The Court of Appeals says the reason given must be related to the particular case and to the outcome of the case, following Batson, (Petitioner's Appendix A-12). "The Prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98, 90 L.Ed. 2d at 88. The Court of Appeals stated that it did not believe the reason given was race-neutral in actuality, but pretextual. (Petitioner's Appendix A-12) The Court of Appeals was correct in its observation that:

> Where the prosecution strikes a prospective juror who is a member of the Defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. (Petitioner's Appendix A-11)

The Court of Appeals was applying the decisions of Batson and the Missouri Supreme Court's decision of State v. Antwine, 743 S.W. 2d 51 (Mo. 1987) (en banc) which

held that the

> proffered neutral explanation must give a clear and reasonable significant explanation of the State's legitimate reason for exercising the challenges.

The Court of Appeals has found that the prosecution must offer some reason which is not related to race other than whether or not the prosecutor likes or dislikes the "looks" of the prospective jury panel member.

The Petitioner argues this Court in Hernandez v. New York, 111 S.Ct. 1859, 1866(4) (1991) rendered a definition of a race-neutral explanation that was not satisfied by the Court of Appeals in the case at bar. The Court of Appeals in the case at bar correctly in the second step of the Batson three-part inquiry states that "the issue is the facial validity of the prosecutor's explanation."

The facial validity of the prosecutor's explanation is found in the words used by the prosecuting attorney in consideration of the facts and circumstances of the jurors whom he is seeking to strike.

The prosecuting attorney in the case at bar said he wanted to strike the particular jurors because he did not like the way they looked. The men looked like African-American men.

The Court of Appeals could and did find that the reason given of disliking a prospective juror's "looks" was insignificant and unreasonable enough to find that the explanation given was a pretext for a racially motivated strike. United States v. Bentley-Smith, 2 F.3d 1368, 1375

(10, 11) (5th Cir. 1993), held intuition is "more vulnerable to the inference that the reason proffered is a proxy for race."

United States v. Banks, 10 F.3d 1044, 1049 (1,2) (4th Cir. 1993), held that

> the reasons...offered by the prosecutor - an unemployed status, suspected alcoholic, family member resident in neighborhood in which some defendants now or formerly resided, shabby dress suggesting irresponsible attitude toward jury service, criminal history - were not intrinsically suspect, were adequately supported by observable fact and were therefore properly determined by the court to be race-neutral.

The case at bar is distinguishable from Banks because in Banks the prosecutor and the record specifically indicated the "shabby dress" of the juror, which had an articulatable race-neutral reason which did not rest just upon the prosecutor's statement of, "I didn't like their looks."

In the case at bar, the reason given had nothing directly to do with the case on trial, such as the jurors' specific backgrounds which might affect their hearing of the case, as cited in United States v. Bentley-Smith, or a reason related to their ability to serve as a juror, such as eye contact or inattentiveness, which would suggest the juror would not pay the attention needed to understand and decide correctly the case. The reason of facial hair given for striking a juror is not nearly as clear or logical or believable a reason as those cited in United States v. Bentley-Smith. Striking a juror because of his facial hair could be at best a pretext for a clever, more specific

reason, such as racism.

The prosecutor's statement he did not like the way the two African-American jurors looked is a cover for discrimination. In State v. Blackmon, 477 S.W.2d 482, 486(2-3) (Mo.App. 1988), the Missouri Court of Appeals found that the Batson application of the equal protection clause forbids the use of a peremptory challenge to a potential juror solely on account of his race "or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant," quoting from Batson, 476 U.S. at 89.

The Missouri trial court found in State v. Blackmon, supra at p. 486 that the assistant prosecutor struck the black venireman for the following reasons: "I did not strike Armour because he was black. I struck him because he was a member of the black community." At an evidentiary hearing, the assistant prosecutor was asked his reason for striking Mr. Armour. The prosecuting attorney testified he was raised in southeast Missouri and he had personal knowledge that towns in southeast Missouri had black communities. He said, "I was again concerned that he [Mr. Armour] would not only know Mr. Blackmon or his family, but again be partial toward Mr. Blackmon based upon Mr. Blackmon's good family reputation in the black community." The Court of Appeals upheld the trial court's finding the state did not have a racially neutral reason for striking the venireman.

In the case at bar, the prosecutor said he struck the

two African-American jurors because of their "looks." Striking a person because of his looks is a cover for striking him because of his race. The prosecutor's only reason for striking juror #22, an African-American man, was because of the way he looked to the prosecutor. For a prosecutor to say he does not like the way they look is the same as a prosecutor saying he does not like where they come from. If the person comes from a black community and is struck as a peremptory challenge by the prosecutor, the prosecutor is acting upon the assumption that black jurors as a group will be unable impartially to consider a state's case against a black defendant. See Batson, 476 U.S. at 89.

The Petitioner attacks the Court of Appeals for merely following this line of logic that a reason given which is not clearly related to a juror's ability to hear fairly and decide the case is less believable. (Petitioner's Petition, p. 16)

The Panel Opinion did not pronounce a new standard when it stated that:

> the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. (Petitioner's Appendix, A-11)

United States v. Brooks, 2 F.3d 838 at p. 840(1-3) (8th Cir. 1993), rehearing denied, cert. denied, 114 S.Ct. 1117, 127 L.Ed. 2d 427, held, citing Hernandez v. New York, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991) a prosecutor's explanation for a strike is considered race-neutral if the

explanation is facially based on something other than the juror's race, i.e., if discriminatory intent is not inherent in the stated reason.

The Petitioner states the Court of Appeals has added a "new legal requirement" by saying the Court of Appeals requires the striking litigant to "articulate some plausible race-neutral reason for believing those factors will somehow affect the person's abilities to perform his or her duties as a juror." (Petitioner's Petition p. 17) The Court of Appeals in the case at bar has not created a new legal requirement but has merely repeated what is the second step of the Batson analysis. The Court of Appeals' decision of following the Batson requirements that the prosecution articulate a race-neutral explanation for striking the jurors in question is the same definition which Hernandez gives of what is a "neutral explanation." Hernandez, at p. 1866(4). This Court in Hernandez stated a "neutral explanation" is "an explanation based on something other than the race of the juror." In the case at bar, the prosecuting attorney stated his reason for striking the jurors was "I don't like the way they look."

The Court of Appeals expresses what Hernandez held when it says a "neutral explanation" has the issue of "the facial validity of the prosecutor's explanation." The Court of Appeals states the prosecutor's explanation must state some factors that will affect that person's ability to perform his or her duties as a juror and is based on something other than

the race of the juror, in order to be believable. The Court of Appeals has followed the application of the Batson standard as expressed in Hernandez.

United States v. Brooks, 2 F.3d 838 (8th Cir. 1983), rehearing denied, cert. denied, 114 S.Ct. 1117, 127 L.Ed.2d 427 held if the defendant makes a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race, then the burden shifts to the prosecutor to give a race-neutral explanation for striking the prospective jurors.

In Brooks, supra, at p. 841(6) the United States Court of Appeals for the 8th Circuit, applied the same second step of the Batson test in evaluating the reasons the prosecutor used a peremptory challenge in the case at bar. In Brooks, supra at p. 841(5), the prospective juror told of his experience as a victim of police brutality. The Court of Appeals said this reason articulated by the prosecuting attorney qualified as a race-neutral reason for the peremptory challenge.

In Hernandez, at p. 1867, col. 1, this Court accepted as race-neutral the prosecutor's explanation for his peremptory challenges against those whose conduct during voir dire persuaded him they might have difficulty in accepting the translator's rendition of Spanish-language testimony. This Court found at Hernandez, at p. 1871 (12) no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of the Latino jurors. This Court said:

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer.

The prosecutor's concern in Hernandez as to whether or not the jurors would defer to an official translation directly impacts upon that juror's ability to render the type of jury service which would be correct and appropriate in terms of their duty as a juror. Their ability to be bilingual was not a challenge based on the assumption that the race of the prospective Latino jurors would make them "as a group" that would "be unable impartially to consider the State's case against a" Latino "defendant," quoting the language of Batson, 476 U.S., at 89(2,3).

Hernandez is authority for the Court of Appeals' ruling that the trial court should look at factors which somehow affect the person's ability to perform his or her duties as a juror in deciding if a race-neutral reason has been articulated by the state.

In Pemberthy v. Beyer, 19 F.3d 857, 872 (10, 11) (3rd Cir. 1994) rehearing and suggestion for rehearing en banc denied, the Court of Appeals said the trial court should consider any extrinsic (emphasis added) evidence of motivation such as whether the prosecutor's strikes correlate better with a language ability or with race. The prosecutor made peremptory challenges of Spanish-speaking jurors on the ground of his concern that they would not accept the court-

approved translation of taped conversations in Spanish. Pemberthy at p. 872 said the court should consider if the translation issue was central to the case. Pemberthy stands for the proposition the juror's ability to perform his or her duty as a juror is a race-neutral reason for a peremptory challenge.

Concerning the standard of review of federal court district decisions on the issue of the third step of a Batson challenge, the standard advocated by the Petitioner of whether the State Court's factual determination is "fairly supported by record " has not been met. There is not fair support from the record to uphold the State Court's finding of no intentional discrimination. The Missouri court's decision and the District Court decision is "not fairly supported by the record," as required by 28 U.S.C. Section 2254(d)(8). Subsection (d)(8) means the factual determination of no purposeful discrimination by the prosecutor is not supported by the record.

Batson, in footnote 21, says, "a review court ordinarily should give" the trial court "findings great deference." 476 U.S. at 98, 90 L.Ed. 2d at 89. The Petitioner complains on page 24 of his Petition that "the record below can support the United States District Court and the Missouri Court of Appeals. The Court of Appeals states:

> The prosecution's explanation for striking juror 22 in the present case was pretextual. The prosecution's explanation was facially neutral...without more, which is precisely what Antwine cautions against. 743 S.W. 2d at 65. (Petitioner's Appendix A-12)

The Court of Appeals, when it found the prosecutor's reason was insufficient, has found that the prosecutor's brief explanation of the "looks" of the jurors was merely a pretext. The words, "without more," refer to an explicit requirement of the state to articulate exactly why it seeks to strike the specific juror with a reason that bears no relationship to the race of the juror.

In Splunge v. Clark, 960 F.2d 705, 709(6) (7th Cir. 1992), rehearing denied,

> A race-neutral explanation is required precisely because race-neutral intent in striking potential jurors is required. Where the prosecutor's neutral explanation is an obvious mask for a race-based challenge, the prosecutor has not met his burden under Batson.

In Splunge, the prosecution sought to strike a venireman named Connie Brodie. A question tne prosecutor asked Ms. Brodie was, "The fact that Mr. Splunge is a black man, as you are a black woman, is that going to enter into your mind in determining whether he is guilty or innocent?" Ms. Brodie answered, "No." Splunge, at p. 707(1). The only other question asked of Ms. Brodie was, "If the state proves its case to you beyond a reasonable doubt, will you find the defendant guilty?" Ms. Brodie answered, "Yes." Splunge, at p. 708(5).

The Court of Appeals found the prosecutor's explanation was "an obvious mask for a race-based challenge." Splunge, at p. 709(6).

The Petitioner desires to require the defense attorney

at the trial court level to inform the trial court that he believes the race-neutral reason for striking the jurors in question was "a pretext." (Petitioner's Petition, p. 25) The Petitioner is attempting to add a requirement for the defense bar by a misapplication of cases such as State v. Hudson, 822 S.W.2d 477 (Mo.App. 1991) by requiring the defense attorney to say the specific words that the race-neutral explanation was a "pretext." Batson does not require this. State v. Hudson, at p. 481(3) merely states, "once the State came forward with neutral explanations, the Defendant had the obligation to demonstrate that the State's proffered explanations were pretextual." State v. Hudson does not stand for the proposition that the defense counsel must make his objection using a specific word "pretextual" in referring to the prosecutor's peremptory challenge. The Court in Batson said, "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." Id. 476 U.S. at 99, 90 L.Ed. 2d at 89. Respondent is seeking to add a requirement to a Batson challenge to make the defense attorney at trial say the particular word, "pretextual," when such is not required.

The Petitioner states what he believes are the facts in the record supporting a determination of no intentional discrimination. First, the Petitioner states such a fact is the prosecutor voluntarily defending his use of peremptory challenges without a request by the judge. (Petitioner's Petition, p. 28). This is without merit. The prosecuting

attorney at the trial court level was probably familiar with the Batson decision and understood that he had to come forward with a race-neutral reason for his peremptory challenge of the jurors. The prosecutor probably decided there was no need for him to wait for the trial court to ask an expected question. Once a prosecutor has offered race-neutral explanation for peremptory changes and the trial court has ruled on the question of intentional discrimination, the first issue of whether the defendant made a prima facie showing is moot. See U.S. v. Bishop, 959 F.2d 820 (9th Cir. 1992).

The Petitioner claims the prosecutor's failure to strike all African-American venirepersons is an indicator the prosecutor did not intend to discriminate. (Petitioner's Petition, p. 27). Splunge v. Clark, supra, held under the Fourteenth Amendment a prosecutor may not exercise even a single peremptory challenge if through that challenge he intentionally discriminates on the basis of race.

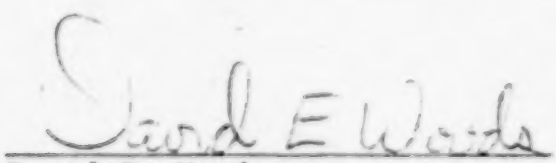
The Petitioner claims that the prosecution was unaware of which venirepersons were African-American (Petitioner's Petition, p. 28). The defense attorney asked the trial court if it would call "those two individuals to ask them if they were Black or would the court judicial notice that they were Black individuals." The defense attorney was met with the trial court saying "no." (Petitioner's Appendix A-42). The trial court's ruling indicates it was obvious to the trial court the two prospective jurors were African-American.

In summary, the Court of Appeals correctly applied the analysis and reasoning behind Batson and Hernandez, recognizing that anyone can give a facially race-neutral reason for discrimination, but that the Court does not have to believe that reason. Further, the Court was correct in deciding that the trial court's decision of no intentional discrimination was not fairly supported by the record.

CONCLUSION

For the reasons stated herein, the Respondent prays this Court shall not issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, but shall sustain the judgment of that Court, and any other relief the Court deems just and proper to grant.

Respectfully submitted,



David E. Woods
Missouri Bar Enrollment Number 28779
300 Fort Zumwalt Square, Suite 110
O'Fallon, Missouri 63366
(314) 978-4187

Counsel of Record
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

JAMES PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONS CENTER *v.* JIMMY ELEM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94–802. Decided May 15, 1995

PER CURIAM.

Respondent was convicted of second-degree robbery in a Missouri court. During jury selection, he objected to the prosecutor's use of peremptory challenges to strike two black men from the jury panel, an objection arguably based on *Batson* v. *Kentucky*, 476 U. S. 79 (1986). The prosecutor explained his strikes:

> "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair . . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." App. to pet. for Cert. A–41.

The prosecutor further explained that he feared that juror number 24, who had had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that "to have a robbery you have to have a gun, and there is no gun in this case." *Ibid.*

The state trial court, without explanation, overruled

respondent's objection and empaneled the jury. On direct appeal, respondent renewed his *Batson* claim. The Missouri Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch'" and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination." *State* v. *Elem*, 747 S. W. 2d 772, 775 (Mo. App. 1988).

Respondent then filed a petition for habeas corpus under 28 U. S. C. §2254, asserting this and other claims. Adopting the magistrate judge's report and recommendation, the District Court concluded that the Missouri courts' determination that there had been no purposeful discrimination was a factual finding entitled to a presumption of correctness under §2254(d). Since the finding had support in the record, the District Court denied respondent's claim.

The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ of habeas corpus. It said:

> "[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, 'I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustache[] and the beard[] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22." 25 F. 3d 679, 683 (1994).

It concluded that the "prosecution's explanation for striking juror 22 . . . was pretextual," and that the state trial court had "clearly erred" in finding that striking juror number 22 had not been intentional discrimination.

Id., at 684.

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez* v. *New York*, 500 U. S. 352, 358–359 (1991) (plurality opinion); *id.*, at 375 (O'CONNOR, J., concurring in judgment); *Batson*, *supra*, at 96–98. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U. S., at 360 (plurality opinion); *id.*, at 374 (O'CONNOR, J., concurring in judgment).

The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i.e.*, a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. 25 F. 3d, at 683. It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Batson*, *supra*, at 98; *Hernandez*, *supra*, at 359 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step 3 is quite different from saying that a trial judge *must terminate* the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the

principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Cf. *St. Mary's Honor Center* v. *Hicks*, 509 U. S. ___, ___ (1993) (slip op., at 7–8).

The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Batson*, 476 U. S., at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)), and that the reason must be "related to the particular case to be tried," 476 U. S., at 98. See 25 F. 3d, at 682, 683. This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. See *Hernandez*, *supra*, at 359; cf. *Burdine*, *supra*, at 255 ("The explanation provided must be legally sufficient to justify a judgment for the defendant").

The prosecutor's proffered explanation in this case—that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard—is race-neutral and satisfies the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike. "The wearing of beards is not a characteristic that is peculiar to any race." *EEOC* v. *Greyhound Lines, Inc.* 635 F. 2d 188, 190, n. 3 (CA3 1980). And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step 3, where the state court found that the prosecutor was not motivated by discriminatory intent.

In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly supported by the record." 28 U. S. C. §2254(d)(8). See *Marshall* v. *Lonberger*, 459 U. S. 422, 432 (1983). Here the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record. For its whole focus was upon the *reasonableness* of the asserted nonracial motive (which it thought required by step 2) rather than the *genuineness* of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility, see *Batson*, *supra*, at 98, n. 21. Cf. *Marshall*, *supra*, at 434.

Accordingly, respondent's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

In my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case. The Court does this today when it overrules a portion of our opinion in *Batson* v. *Kentucky*, 476 U. S. 79 (1986).[1]

In *Batson*, the Court held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor to use peremptory challenges to exclude African Americans from jury service because of their race. The Court articulated a three-step process for proving such violations. First, a pattern of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima face case by tendering a race-neutral explanation

[1]This is the second time this Term that the Court has misused its summary reversal authority in this way. See *Duncan* v. *Henry*, 513 U. S. ___, ___-___ (1995) (STEVENS, J., dissenting).

for the strikes. Third, the court must decide whether that explanation is pretextual. *Id.*, at 96–98. At the second step of this inquiry, neither a mere denial of improper motive nor an incredible explanation will suffice to rebut the prima facie showing of discriminatory purpose. At a minimum, as the Court held in *Batson*, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.*, at 98.[2]

Today the Court holds that it did not mean what it said in *Batson*. Moreover, the Court resolves a novel procedural question without even recognizing its importance to the unusual facts of this case.

I

In the Missouri trial court, the judge rejected the defendant's *Batson* objection to the prosecutor's peremptory challenges of two jurors, juror number 22 and juror number 24, on the ground that the defendant had not made out a prima facie case of discrimination. Accordingly, because the defendant had failed at the first step of the *Batson* inquiry, the judge saw no need even to confirm the defendant's assertion that jurors 22 and 24 were black;[3] nor did the judge require the prosecutor to

[2] We explained: "Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' *Alexander* v. *Louisiana*, 405 U. S., at 632. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' *Norris* v. *Alabama*, [294 U. S. 587, 598 (1935)]. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson* v. *Kentucky*, 476 U. S., at 97–98 (footnotes omitted).

[3] The following exchange took place between the defense attorney and the trial judge:

"MR. GOULET: Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record if the Court would like to call up these two individuals to ask them if they are black or will the Court take judicial notice that they are black individuals?

"THE COURT: I am not going to do that, no, sir." App. to Pet. for Cert. A–42.

explain his challenges. The prosecutor nevertheless did volunteer an explanation,[4] but the judge evaluated neither its credibility nor its sufficiency.

The Missouri Court of Appeals affirmed, relying partly on the ground that the use of one-third of the prosecutor's peremptories to strike black veniremen did not require an explanation, *State* v. *Elem*, 747 S. W. 2d 772, 774 (1988), and partly on the ground that if any rebuttal was necessary then the volunteered "explanation constituted a legitimate 'hunch,'" *id.*, at 775. The court thus relied, alternatively, on steps one and two of the *Batson* analysis without reaching the question whether the prosecutor's explanation might have been pretextual under step three.

The Federal District Court accepted a magistrate's recommendation to deny petitioner's petition for habeas corpus without conducting a hearing. The magistrate

[4] The prosecutor stated:

"I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee-type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." App. to Pet. for Cert. A–41.

had reasoned that state-court findings on the issue of purposeful discrimination are entitled to deference. App. to Pet. for Cert. A–27. Even though the trial court had made no such findings, the magistrate treated the statement by the Missouri Court of Appeals that the prosecutor's reasons "constituted a legitimate 'hunch'" as a finding of fact that was supported by the record.[5] When the case reached the United States Court of Appeals for the Eighth Circuit, the parties apparently assumed that petitioner had satisfied the first step of the *Batson* analysis.[6] The disputed issue in the Court of Appeals was whether the trial judge's contrary finding was academic because the prosecutor's volunteered statement satisfied step two and had not been refuted in step three.

The Court of Appeals agreed with the State that excluding juror 24 was not error because the prosecutor's concern about that juror's status as a former victim of a robbery was related to the case at hand. 25 F. 3d 679, 681, 682 (1994). The court did, however, find a *Batson* violation with respect to juror 22. In rejecting the prosecutor's "race-neutral" explanation for the strike, the Court of Appeals faithfully applied the standard that we articulated in *Batson*: The explanation was not "'*related to the particular case to be tried*.'" *Id.*, at 683, quoting 476 U. S., at 98 (emphasis in Court of Appeals opinion).

Before applying the *Batson* test, the Court of Appeals noted that its analysis was consistent with both the Missouri Supreme Court's interpretation of *Batson* in *State* v. *Antwine*, 743 S. W. 2d 51 (1987) (en banc), and

[5]The magistrate stated: "The Court of Appeals determined that the prosecutor's reasons for striking the men constituted a legitimate 'hunch' . . . . The record supports the Missouri Court of Appeals' finding of no purposeful discrimination." App. to Pet. for Cert. A–27.

[6]In this Court, at least, the State does not deny that the prosecutor's pattern of challenges established a prima facie case of discrimination.

this Court's intervening opinion in *Hernandez* v. *New York*, 500 U. S. 352 (1991). 25 F. 3d, at 683. Referring to the second stage of the three-step analysis, the *Antwine* court had observed:

> "We do not believe, however, that *Batson* is satisfied by 'neutral explanations' which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote 'neutral explanations' which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced *Batson*." 743 S. W. 2d at 65.

In *Hernandez*, this Court rejected a *Batson* claim stemming from a prosecutor's strikes of two Spanish-speaking Latino jurors. The prosecutor explained that he struck the jurors because he feared that they might not accept an interpreter's English translation of trial testimony given in Spanish. Because the prosecutor's explanation was directly related to the particular case to be tried, it satisfied the second prong of the *Batson* standard. Moreover, as the Court of Appeals noted, 25 F. 3d, at 683, the plurality opinion in *Hernandez* expressly observed that striking all venirepersons who speak a given language, "without regard to the particular circumstances of the trial," might constitute a pretext for racial discrimination. 500 U. S., at 371–372 (opinion of KENNEDY, J.).[7] Based on our precedent, the Court of

[7]True, the plurality opinion in *Hernandez* stated that explanations unrelated to the particular circumstances of the trial "may be found by the trial judge to be a pretext for racial discrimination," 500 U. S., at 372, and thus it specifically referred to the third step in the *Batson* v. *Kentucky*, 476 U. S. 79 (1986), analysis. Nevertheless, if this comment was intended to modify the *Batson* standard for determining the sufficiency of the prosecutor's response to a prima facie case, it was

Appeals was entirely correct to conclude that the peremptory strike of juror 22 violated *Batson* because the reason given was unrelated to the circumstances of the trial.[6]

Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," *ante*, at 3, even if it is "silly or superstitious," *ibid.*, is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter 'S'" should satisfy step two, though a statement that "I had a hunch" should not. See *ante*, at 4; *Batson*, 476 U. S., at 98. It is not

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certainly an obtuse method of changing the law.

[6] In my opinion, it is disrespectful to the conscientious judges on the Court of Appeals who faithfully applied an unambiguous standard articulated in one of our opinions to say that they appear "to have seized on our admonition in *Batson* . . . that the reason must be 'related to the particular case to be tried,' 476 U. S., at 98." *Ante*, at 4. Of course, they "seized on" that point because *we told them to*. The Court of Appeals was following *Batson*'s clear mandate. To criticize those judges for doing their jobs is singularly inappropriate.

The Court of Appeals for the Eighth Circuit is not the only court to have taken our admonition in *Batson* seriously. Numerous courts have acted on the assumption that we meant what we said when we required the prosecutor's neutral explanation to be "related to the particular case to be tried." See, *e.g.*, *Jones* v. *Ryan*, 987 F. 2d 960, 974 (CA3 1993); *Ex parte Bird*, 594 So. 2d 676, 682–683 (Ala. 1991); *State* v. *Henderson*, 112 Ore. App. 451, 456, 829 P. 2d 1025, 1028 (1992); *Whitsey* v. *State*, 796 S. W. 2d 707, 713–716 (Tex. Crim. App. 1989); *Jackson* v. *Commonwealth*, 8 Va. App. 176, 186–187, 380 S. E. 2d 1, 6–7 (1989); *State* v. *Butler*, 731 S. W. 2d 265, 271 (Mo. App. 1987); *Slappy* v. *State*, 503 So. 2d 350, 355 (Fla. App. 1987); *Walker* v. *State*, 611 So. 2d 1133, 1142 (Ala. Crim. App. 1992); *Huntley* v. *State*, 627 So. 2d 1011, 1012 (Ala. Crim. App. 1991). This Court today calls into question the reasoning of all of these decisions without even the courtesy of briefing and argument.

too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, *and* trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253 (1981). That, in any event, is what we decided in *Batson*.

II

The Court's peremptory disposition of this case overlooks a tricky procedural problem. Ordinarily, a federal appeals court reviewing a claim of *Batson* error in a habeas corpus proceeding must evaluate, with appropriate deference, the factual findings and legal conclusions of the state trial court. But in this case, the only finding the trial judge made was that the defendant had failed to establish a prima facie case. Everyone now agrees that finding was incorrect. The state trial judge, holding that the defendant had failed at step one, made no finding with respect to the sufficiency or credibility of the prosecutor's explanation at step two. The question, then, is whether the reviewing court should (1) go on to decide the second step of the *Batson* inquiry, (2) reverse and remand to the District Court for further proceedings, or (3) grant the writ conditioned on a proper step-two and (if necessary) step-three hearing in the state trial court. This Court's opinion today implicitly ratifies the Court of Appeals' decision to evaluate on its own whether the prosecutor had satisfied step two. I think that is the correct resolution of this procedural question, but it deserves more consideration than the Court has provided.

In many cases, a state trial court or a federal district court will be in a better position to evaluate the facts surrounding peremptory strikes than a federal appeals court. But I would favor a rule giving the appeals court discretion, based on the sufficiency of the record, to evaluate a prosecutor's explanation of his strikes. In

this case, I think review is justified because the prosecutor volunteered reasons for the challenges. The Court of Appeals reasonably assumed that these were the same reasons the prosecutor would have given had the trial court required him to respond to the prima facie case. The Court of Appeals, in its discretion, could thus evaluate the explanations for their sufficiency. This presents a pure legal question, and nothing is gained by remand if the appeals court can resolve that question on the facts before it.

Assuming the Court of Appeals did not err in reaching step two, a new problem arises when that court (or, as in today's case, this Court) conducts the step-two inquiry and decides that the prosecutor's explanation was sufficient. Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson*? Again, I think the question whether the Court of Appeals decides, or whether it refers the question to a trial court, should depend on the state of the record before the Court of Appeals. Whatever procedure is contemplated, however, I think even this Court would acknowledge that some implausible, fantastic, and silly explanations could be found to be pretextual without any further evidence. Indeed, in *Hernandez* the Court explained that a trial judge could find pretext based on nothing more than a consistent policy of excluding all Spanish-speaking jurors if that characteristic was entirely unrelated to the case to be tried. 500 U. S., at 371–372 (plurality opinion of KENNEDY, J.). Parallel reasoning would justify a finding of pretext based on a policy of excusing jurors with beards if beards have nothing to do with the pending case.

In some cases, conceivably the length and unkempt character of a juror's hair and goatee-type beard might give rise to a concern that he is a nonconformist who might not be a good juror. In this case, however, the prosecutor did not identify any such concern. He merely said he did not "'like the way [the juror] looked,'" that the facial hair "'look[ed] suspicious.'" *Ante*, at 1. I

think this explanation may well be pretextual as a matter of law; it has nothing to do with the case at hand, and it is just as evasive as "I had a hunch." Unless a reviewing court may evaluate such explanations when a trial judge fails to find that a prima facie case has been established, appellate or collateral review of *Batson* claims will amount to nothing more than the meaningless charade that the Missouri Supreme Court correctly understood *Batson* to disfavor. *Antwine*, 743 S. W. 2d, at 65.

In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the *Batson* rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in *Batson*.

I respectfully dissent.